91-703

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

GUSTO RECORDS, INC. AND G.M.L., INC.,

Petitioners,

vs.

B.J. THOMAS, GENE F. PITNEY, SHIRLEY OWENS ALSTON, DORIS COLEY JACKSON, BEVERLY LEE, AND VERNON McFADDEN, JR.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE PURCHASER OF A MASTER RECORDING SUCCEEDS TO THE UNPAID ROYALTY OBLIGATIONS OF THE TRANSFEROR.

2. WHETHER THE PURCHASER OF A MASTER RECORDING INCURS AN OBLIGATION TO PAY NON-CONTRACTUAL ARTIST ROYALTIES ON INCOME RECEIVED FROM THE ACT OF LICENSING THOSE MASTER RECORDINGS.

3. WHETHER A FIFTY PERCENT (50%) ROYALTY RATE MAY BE IMPOSED ON A LICENSOR OF MASTER RECORDINGS TO FOREIGN ENTITIES WHEN THE RECORDING CONTRACT IMPOSES A LESSER RATE ON INCOME RECEIVED FROM THOSE FOREIGN LICENSEES.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 8

QUESTION 1:

WHETHER THE PURCHASER OF A MASTER RECORDING SUCCEEDS TO THE UNPAID ROYALTY OBLIGATIONS OF THE TRANSFEROR 9

QUESTION 2:

WHETHER THE PURCHASER OF A MASTER RECORDING INCURS AN OBLIGATION TO PAY NON-CONTRACTUAL ARTIST ROYALTIES ON INCOME RECEIVED FROM THE ACT OF LICENSING THOSE MASTER RECORDINGS 11

QUESTION 3:

WHETHER A FIFTY PERCENT (50%) ROYALTY RATE MAY BE IMPOSED ON A LICENSOR OF MASTER RECORDINGS TO FOREIGN ENTITIES WHEN THE RECORDING CONTRACT IMPOSES A LESSER RATE ON INCOME RECEIVED FROM THOSE FOREIGN LICENSEES 11

CONCLUSION 17

APPENDIX A ..... App. 1

APPENDIX B ..... App. 36

APPENDIX C ..... App. 54

APPENDIX D ..... App. 74

TABLE OF AUTHORITIES

Page

CASES

Pevensey Press Ltd. v. Prentice-Hall, Inc., 555 NYS 2d 769, 161 A.D. 2d 500 (1990) 13, 14

MISCELLANEOUS AUTHORITIES

6 Fletcher, *Cyclopedia of the Law of Private Corporation*, § 2572 at 690..... 10

S. Shemel & M. Krasilovsky, *This Business of Music* 9

Black's Law Dictionary, p. 1070 (rev. 4th ed. 1968) 15

Petitioners, Gusto Records, Inc. and G.M.L., Inc. respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered in this action on July 29, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been reported at 939 F.2d 395 (6th Cir. 1991) and is reprinted at App. B, as is the opinion on the Petition to Rehear, which has not been reported.

The U.S. District Court for the Middle District of Tennessee's Memorandum Opinion has not been reported and is reprinted as App. C. at C-1.

JURISDICTION

The decision of the Court of Appeals was entered on July 29, 1991. A Petition to Rehear was denied on September 23, 1991. Petitioners invoke the jurisdiction of this Court as set forth in 28 U.S.C. § 1254 and seek the issuance of the Writ of Certiorari pursuant to Supreme Court Rule 10.1(a) because, among other reasons, the Court of Appeals has departed from accepted legal principles in an area of significance and involving questions of first impression, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

Petitioners seek review of a judgment of a divided Sixth Circuit Court of Appeals. The basis for jurisdiction in the District Court was diversity of citizenship, pursuant to 28 U.S.C. § 1332, in that the Respondents and Petitioners were each citizens of different states and the matter in controversy, exclusive of interest and costs, exceeded Fifty Thousand Dollars ($50,000).

In the 1960's, Gene Pitney, B.J. Thomas and the Shirelles ("Respondents")[1] each signed recording contracts. They all became vocal artists who attained prominence in the 1960's and 70's. Pursuant to these contracts, the Respondents made a number of master recordings or "masters" which embody their vocal performances. Master recordings are the original tangible medium on which a musical performance is captured and from which all subsequent records are made. These master recordings were later sold to various entities and, in March 1984, the Petitioners, Gusto Records, Inc. and G.M.L., Inc. purchased the master recordings in a bulk sale of assets from Koala Record Company, which had purchased them from another intervening owner.

During their ownership of the master recordings, the Petitioners received income from four (4) sources as the result of their commercial exploitation of the masters. First, they derived income *from sales of records* manufactured from the master recordings. Second, they received

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[1] The Shirelles was a singing group composed originally of four artists: Shirley Owens Alston, Doris Coley Jackson, Beverly Lee and Addie Harris McFadden.

income *from licensing the masters to United States entities* which in turn manufactured and sold records made therefrom and, in return, paid a license fee for the use of those masters to the Petitioners. Third, they received income *from licensing the masters to foreign entities* which, in turn, would pay Respondents license fees for their use of the masters. Finally, the Petitioners received income from the granting *of synchronization licenses* or "public performance licenses" to third-parties, which allowed the third-parties to use the master recordings in motion pictures or television as background or theme music during the broadcast of visual images.

The Recording Contracts:

Gene Pitney entered his first Contract with Musicor Records on July 22, 1960 (Each of the Pitney contracts is contained at Appendix A-1). Musicor agreed that during the first year of the Pitney Contract, it would pay Pitney royalties as follows:

> During the first year of the agreement . . . a royalty of three percent (3%) and during the second year of this agreement . . . a royalty of four percent (4%) of the suggested retail price of ninety percent (90%) of all records embodying on both sides thereof the compositions performed by the artists and recorded hereunder manufactured and actually sold by the company or any subsidiary, affiliate or licensee to whom the company has supplied a copy or a duplicate of a master. . . . (Pitney Contract ¶ 4). (emphasis supplied).

The Pitney Contract was amended in 1966 to increase royalties payable to Pitney on sales of records outside the

United States to four percent (4%) and provided that with respect to records sold by direct mail or through clubs, the royalty would be one-half (1/2) the applicable royalty provided in the Pitney Contract. Thereafter, Musicor extended the Pitney Contract for six (6) additional months until January 21, 1973, and raised Pitney's royalties on domestic sales to seven percent (7%).

In February 1961, the Shirelles entered into a recording contract with Scepter (the "Shirelles Contract"). (Each of the Shirelles' contracts is contained at Appendix A-2). Scepter agreed to pay the Shirelles royalties as follows:

> We shall pay you as royalty a sum equal to four percent (4%) of the net retail list price in the United States of America based on ninety percent (90%) of all double-faced records manufactured and sold by us. . . . (Appendix A-2, ¶ 4).

The Shirelles Contract further provided that the Shirelles would receive royalties from income received by Scepter from foreign licensing (but not domestic licensing) of the masters as follows:

> In the case of phonograph records and other copies manufactured and sold in *foreign countries by any* subsidiary, affiliate, *licensee* or nominees to whom we have supplied a copy or duplicate of a master . . . *we will pay you one-half (1/2) of the United States of America royalty rate out of all net license fees paid and received by us* for phonograph records and other copies so manufactured sold. (*Id.*) (emphasis added).

The Shirelles agreed that they had no claims to the masters and that Scepter was free to sell and "deal in" the masters:

> 8. *All recordings* and all records and reproductions made therefrom . . . *shall be entirely our* [Scepter's] *property, free of any claims whatsoever by you* or any person deriving any rights or interests from you. Without limitation of the foregoing we [Scepter] shall have the right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings . . . and *to sell and deal in the same*. . . . (Appendix A-2, ¶ 8). (emphasis added).

The Shirelles Contract also provided that Scepter could assign the contract or any masters made thereunder and provided that the contract inured to the benefit of Scepter's successors and assigns. (*Id.* at ¶ 11). In December 1965, the Shirelles entered a second contract, dated as of February 14, 1966, with Scepter. (Appendix A-2). The 1966 Shirelles contract provided the same basic terms and conditions as the original contract, but modified the second sentence of paragraph 8 to make it clear that the Shirelles had disclaimed any interest in "synchronization" or "public performance" fees. It provided that:

> We [Scepter] shall have the right to make . . . tape recordings . . . and to cause the public performance thereof without payment to you. . . . (Appendix A-2, ¶ 8).

On April 22, 1968, B.J. Thomas entered a recording contract with Scepter (Appendix A-3), which was identical to the Shirelles' contract with respect to the payment of royalties except that the base royalty rate was five percent (5%), not four percent (4%). (*Id.* at ¶ 4). Like the Shirelles contract, the Thomas contract provided that

Thomas would receive royalties on license income received by Scepter only from foreign licensing. (*Id.*).

The Thomas contract contained a provision identical to paragraph 8 of the 1966 Shirelles contract in which Thomas waived any rights to synchronization or public performance fees, and further agreed that Scepter owned the masters free of any claims by him and that Scepter was free to "sell and deal in" the masters. (Appendix A-3, ¶ 8).

Thus, the contracts provided a framework under which:

(A) The artist would record a master from which the record company could release records and pay a royalty; and

(B) Income received by the record company from foreign licensees would be subject to royalties at one-half (1/2) of the standard record rate *e.g.* two and one-half percent (2 1/2%) and "out of all net license fees paid and received"; and

(C) There was no provision for royalties on income received by the record company from domestic licensees; and

(D) The artists agreed that all recordings made by them would be the record company's property free of any claims by the artists and that the record company would have the right to sell and deal in those recordings.

Pitney's contract made no provision for royalties to be paid to him out of either foreign or domestic license fee income received from the licensor.

In this action, the Respondent artists contended that they were owed:

(A) Fifty percent (50%) of all license fee income received from foreign or domestic licensees, "in accordance with industry custom and practice"; and

(B) These royalties, as well as unpaid record royalties, for six (6) years from the date of filing of the Complaint (the Tennessee statute limitations period) even though Petitioners did not purchase the masters until 1984; and

(C) A fifty percent (50%) royalty on synchronization fees received by the Petitioners.

The Petitioners contended that they only owed record royalties and royalties on income received from foreign licensees, pursuant to the recording contracts, at the contractual rates only for the period after they purchased the masters and began to exploit them. The Petitioners further contended that because there was no provision for payment of royalties to the artist on domestic license income received, and because the artists had expressly disclaimed any interest in income received by the record companies from "dealing in" the masters, they did not owe any royalty on domestic licensee fee income. The Petitioners also contended that because there was an express waiver by the Shirelles and Thomas to any rights to synchronization fee royalties, they owed no royalties on synchronization fee income. Finally, Petitioners contended that they did not succeed to any prior obligations for unpaid royalties by merely buying the master recordings and that as transferee of those master recordings

they did not succeed to any liabilities which may have preexisted their purchase of those master recordings.

The district court, ignoring the contractual provisions, agreed with the Respondent artists on all points except that it did find that Thomas and the Shirelles had disclaimed any interest in synchronization fee income, and rendered a judgment for unpaid royalties and prejudgment interest of approximately $1.2 million. The United States Court of Appeals for the Sixth Circuit affirmed the district court in a 2 to 1 decision, with Judge Cornelia Kennedy dissenting in part, her opining that absent some evidence of an agreement to assume the liabilities preexisting its purchase of the master recordings, the transferee of the master recording did not succeed to the preexisting liabilities for unpaid royalties of previous owners of the masters. The Sixth Circuit denied a Petition for Rehearing although Judge Kennedy voted to rehear for the reasons set out in her dissent. Petitioners then obtained a stay of thirty (30) days of the issuance of the mandate pending their filing this Petition for Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE PETITION

This case presents three questions of exceptional importance and significance to the recording industry about which there is lack or dearth of guiding precedent.

QUESTION 1:

WHETHER THE PURCHASER OF A MASTER RECORDING SUCCEEDS TO THE UNPAID ROYALTY OBLIGATIONS OF THE TRANSFEROR.

The decision by the Court of Appeals that Petitioners succeeded to preexisting obligations of the transferors of master recordings departed from the position of commentators; if allowed to stand, it would establish precedent which is contrary to the accepted rules governing succession to preexisting liabilities when one purchases an asset. Moreover, it would have calamitous effects in the recording industry. The district court and the Sixth Circuit have held that by purchasing assets, in this case master recordings, the Petitioners become liable for any outstanding royalties owed to the plaintiff artists by the predecessor owners of the masters. Judge Kennedy observed in her dissent that there was no basis in evidence for finding, as did the majority, that the Petitioners "impliedly assumed" these preexisting obligations. The Sixth Circuit has failed to distinguish between obligations assumed by a purchaser of assets and a purchaser of stock. This is a critical distinction. Naturally, the purchaser of a company's stock succeeds to the seller's liabilities, as well as acquiring its assets. There is no reason why this fundamental tenet of law should not apply with its usual force to the music business. As stated in S. Shemel & M. Krasilovsky *This Business of Music*, a recognized treatise in the music industry,

> In some instances the seller will insist on the sale of the corporate stock. Acquiring a corporate entity may create complicated legal and accounting problems since the buyer then

> inherits the corporate liabilities, including possible liability for back taxes, with suits for royalties, etc., in the average case, it would be simpler for the buyer to purchase the assets of the publisher rather than its stock. *Id.* at 291 (emphasis added). (*See* Appendix D).

Employing the reasoning of the Sixth Circuit, if Scepter, for example, still owed the Shirelles for some royalties dating back to the inception of their recording contract in the early 1960's, were it not for the statute of limitations, Petitioners would now be compelled to pay those obligations. There is no basis to hold Petitioners liable for preexisting obligations incurred by a third-party from the purchase of assets owned by the third-party, whether those assets are widgets or master recordings. *This Business of Music* cites an apt example and distinguishes between the purchaser's obligations to pay *future* as opposed to *prior* royalties:

> Delinquent artist royalties are ordinarily debts with no priority in bankruptcy. Future artist royalties constitute a continuing obligation to be met at the pre-bankruptcy contractual rates. This obligation is commonly assumed by the purchaser of the master recordings. *Id.* at 22. (*See* Appendix D).

It is axiomatic that the purchase by one of the assets of another, without any consolidation, merger or other union in the buyer and seller does not render the buyer liable for the contracts or torts of its successor. *See, e.g.*, 6 Fletcher, *Cyclopedia of the Law of Private Corporation*, § 2572 at 690 (Rev. Ed. 1989). There is no reason that this rule should vary merely because the assets acquired are master recordings which apparently hold a cachet of mystery

which a widget does not. In any event, there is no reason that this transferee should be saddled with prior obligations.

This issue is one of great significance in the recording industry generally. This is true because should this precedent stand, the purchase and sale of master recordings between record companies would be chilled. The commerce in master recordings would be chilled because a transferee would hesitate to buy the master recordings and therewith be liable for all preexisting royalties. Under the ruling of the Sixth Circuit, even were the transferee not to sell records or otherwise exploit the master recordings, he would incur this royalty obligation.

This issue, apparently one of first impression, is of such exceptional significance that it should be reviewed by this Court and guidance should be given with regard to the rights and obligations of record companies and artists in the burgeoning recording industry.

QUESTION 2:

WHETHER THE PURCHASER OF A MASTER RECORDING INCURS AN OBLIGATION TO PAY NON-CONTRACTUAL ARTIST ROYALTIES ON INCOME RECEIVED FROM THE ACT OF LICENSING THOSE MASTER RECORDINGS.

QUESTION 3:

WHETHER A FIFTY PERCENT (50%) ROYALTY RATE MAY BE IMPOSED ON A LICENSOR OF MASTER RECORDINGS TO FOREIGN ENTITIES WHEN THE RECORDING CONTRACT IMPOSES A LESSER RATE ON INCOME RECEIVED FROM THOSE FOREIGN LICENSEES.

Issues 2 and 3 may be addressed together. The Court of Appeals held that the Petitioners were liable for non-

contractual royalties to Pitney, Thomas and the Shirelles of fifty percent (50%) of license fee income received by them from both foreign and domestic licensees.

With respect to Pitney, there is no basis for the Petitioners to owe any royalties on license fee income which they received. First, there is no language in the Pitney contracts obligating Petitioners to pay any royalties to Pitney which is attributable to license fee income which it received from licensees, foreign or domestic. In fact, the opposite implication is the only one which can be drawn from a reading of the contracts. The Pitney contracts specifically provided that he would be paid a three percent (3%) royalty in the first year of the contract and a four percent (4%) royalty in its second year on ninety percent (90%) of all two-sided records sold by Musicor or "any subsidiary, affiliate *or licensee*" in the United States. (Appendix A-1, ¶ 4). It also provided that Pitney would receive one-half (1/2) of those stated royalty rates for all double-sided records sold outside the United States. (*Id.* at ¶ 5). The contract thus merely provides that Pitney is to receive royalties on records sold by Musicor or any subsidiary, affiliate or licensee. Musicor (and thus Petitioners) was not required to share its license income with Pitney. Nonetheless, Pitney would receive artist royalties on records which were sold by licensees at the contractual rates. This is to be distinguished from royalties on income generated by the licensing of masters, about which there is no obligation in the contract to pay royalties. From the fact that the parties specifically addressed the subject of licensing and the financial impact therefrom, the only inference that can be drawn is that Pitney was not to receive royalties on license fee income.

Yet, contract interpretation is not the sole basis for the Petitioners' position. The Sixth Circuit's decision ignores fundamental legal principles which, in this case of first impression, should be corrected. In a case in the book publishing industry which is analogous, the Supreme Court of New York held that a license agreement that restricted the areas in which an American publisher, Prentice-Hall, could sell books, did not place any obligation on Prentice-Hall to restrict where its vendees sold books, nor could it restrict a vendee who was not a party to the license agreement. *Pevensey Press, Ltd. v. Prentice-Hall, Inc.*, 555 NYS 2d 769, 161 A.D. 2d 500 (1990). The New York Supreme Court noted that although the unambiguous written agreement prohibited Prentice-Hall from sales in restricted areas, it did not require it to impose a similar restriction, or any restrictions, on resales by its vendees. The court observed that while nothing prevented the parties, had it been their mutual intention, from including in the agreement a provision requiring defendant Prentice-Hall to prohibit its vendees from selling into such restricted areas, nevertheless, having failed to bargain for such an express restriction, the plaintiff could not expect the court, under the guise of contract construction, to include a restrictive covenant in the parties' unambiguous licensing agreement.

Similarly, here, a contract to which Petitioners are not parties cannot bind it to pay any royalties on license fee income, even were there such an obligation contained in the contract. Had the artist wished to include a provision which would bind licensees or purchasers of master recordings from Musicor to pay royalties on such income, it could have and should have been included in the

original recording agreement. Now, however, Petitioners cannot be forced to pay royalties even were there a basis to do so in the original contract with Musicor.

For the same reason, there is no basis to compel the Petitioners to pay royalties on license fee income received by them. In fact, there is no obligation based upon *Pevensey Press, Ltd.* for Petitioners to pay any royalties to the artists, because they are not parties to the recording contracts. For an additional reason, however, should the contracts be binding upon Petitioners, the artists expressly disclaimed any rights to royalties from license fee income received by the Petitioner when they agreed in paragraph 8 of their contracts that the Petitioners had the exclusive right to "deal in" the master recordings without any claims from the artists. (*See* Appendix A-2 and 3, ¶ 8).

In addition, paragraph 4 of the Thomas and Shirelles contracts specifically provided that the artists were to be paid not fifty percent (50%) of the income from foreign licensee fees received by Petitioners as the Sixth Circuit held, but rather set forth a specific royalty rate out of "all net license fees paid and received by us" from foreign licensees. Paragraph 4 of the contract provided that that rate would be one-half (1/2) of the rate for royalties on royalties paid for sales of records and would be applied to a base of "all net license fees paid and received by us". The Sixth Circuit ignored this contractual language, however, and imposed a fifty percent (50%) royalty rate on both foreign and domestic license fee income. In doing so, it relied upon two bases which evidenced its misunderstanding of the recording industry and the contracts.

First, it redefined the term "licensee" as including only a licensee related to the licensor and not a bona fide third-party arms-length licensee by stating that this term applied only to licensees which were affiliated with the licensor. Not only is this reading strained and contrary to the definition of "licensee", *see Black's Law Dictionary,* 1070 (rev. 4th ed. 1968), but this interpretation effectively rewrote the contracts and emasculated their terms. This decision would inevitably so rewrite every contract between a licensor-record company and the artist, apparently compelling every record company to pay the artist whose recording is licensed, fifty percent (50%) of the proceeds of that transaction, regardless of what the recording contract provides that the artist is to receive from the proceeds of such a licensing transaction.

Secondly, the Sixth Circuit confused the royalty "rate" with the "base" to which it was to be applied. The Court found that the contract language did not allow computation of the royalty to the artist if the license fee received was in the form of a fixed fee payment instead of a percentage of the retail sale price of a record. This conclusion confused the contract term of royalty "rate" with a base to which that rate is applied. Paragraph 4 sets forth the *rate* for royalties to be paid to the artist from foreign license fees received as one-half (1/2) of the *record royalty rate* previously set forth in the contract. The base to which the rate of such license fee royalties is to be applied, however, contrary to the court's reading of the contract, has nothing to do with the "retail list price" of records. Rather, in calculating the royalty due an artist from license fees (as opposed to records sales) the *rate* (*e.g.* one-half (1/2) of four percent (4%) equals two

percent) (2%) is applied to a base defined in the contract is "all net license fees paid and received." Thus, the base is not that of royalties on records sold (*i.e.*, the net retail list price . . . on ninety percent (90%) of all double-faced records) but rather, one-half (1/2) of that rate applied to all net license fees paid and received. It is immaterial, by the clear language of the contract, whether the license fees are received as pro rata on each record or a fixed fee.

The confusion of the Sixth Circuit and its erroneous analysis and result will cause complete calamity in the recording industry because it effectively rewrites the contractual arrangements between artists, record companies and the licensees of master recordings. It applies a rate apparently derived in this record from testimony about "industry custom and practice" setting a fifty percent (50%) royalty fee on license income when the contract provided otherwise.

In addition, the Sixth Circuit ignores the basic principle articulated and recognized by the *Pevensey Press* court that contractual arrangements between the artist and record company cannot bind a mere purchaser of the master recordings who, Petitioners assert, owes no royalties at all to the artist from exploitation of the master recordings. While it should be noted that the artist will receive record royalties if he contracts for them from the original recording company, which cannot delegate that obligation, without negotiating for a contract which obligates the original recording contract to bind its transferees to those provisions, those contractual arrangements can impose no obligation on Petitioners or other transferees of master recordings.

CONCLUSION

For the reasons set forth herein, the Petitioners respectfully request this Court to issue the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A-1

GENE FRANCIS PITNEY CONTRACT – JULY 22, 1965

AGREEMENT made this 22nd day of July, 1960, by and between MUSICOR RECORD CORPORATION of 1650 Broadway, New York 19, New York (hereinafter designated as the "Company"), and GENE FRANCIS PITNEY, of 41 Hammond Street, Rockville, Connecticutt [sic], (hereinafter designated as the "Artist").

WITNESSETH:

WHEREAS, Company is engaged in the business of manufacturing, selling, producing, recording and distributing phonograph records, and

WHEREAS, the Artist to wit, is a singer,

NOW, THEREFORE, in consideration of the mutual promises and agreements hereinbefore and hereinafter contained, and the sum of One Dollar ($1.00), lawful money of the United States of America, each to the other in hand paid, receipt whereof is hereby acknowledged, the parties hereto agree as follows:

1. That the Artist will render his personal services for the recording and making of phonograph records at such studios as the Company may designate, at times and places to be mutually agreed upon by the parties hereto and each recording hereunder shall be subject to the approval of the Company as satisfactory as to quality and commercial value for the manufacture and sale as phonograph records. The Artist will perform for the recording of a minimum number of record sides hereinafter set forth. Additional recordings, in addition to the minimum

number hereinafter specified, shall be performed by the Artist and recorded by the Company at the election of the Company.

2. During the period of this agreement the Artist will not perform for the purpose of making phonograph records for any person, firm or corporation other than the Company, and after expiration of this agreement, the Artist will not perform any musical compositions recorded hereunder for any person, firm or corporation other than the Company for the purpose of making phonograph records within five (5) years after the Company's reporting is made; and the Artist acknowledges that the Artist's services are unique and extraordinary and the Company shall be entitled to equitable and injunctive relief to enforce the provisions of the paragraph in addition to any other available remedies. The Company shall at its sole option select the material to be recorded by the Artist.

3. The Company shall specify and pay the costs, at union scale, of the artist's accompaniment, instrumental arrangement and copying, and all such costs shall be charged against the Artist's royalties.

4. The Company agrees (a) during the first year of the agreement to pay the Artist a royalty of three (3) percent, and during the second year of this agreement to pay the Artist a royalty of four (4%) percent of the suggested retail list price of ninety (90%) percent of all records embodying on both sides thereof the compositions performed by the Artist and recorded hereunder manufactured and actually sold by the Company or any subsidiary, affiliate or licensee to whom the Company has

supplied a copy or duplicate of a master, matrix or embodiment of such composition or compositions and (b) to pay the Artist one-half (1/2) the preceding amounts, respectively, for all records embodying such composition or compositions on only one side thereof manufactured and actually sold during each of such years, within the territorial limitations of the United States of America.

5. The Company agrees to pay the Artist a royalty of one-half (1/2) the amounts specified in paragraph "4" (a) and (b) thereof, with respect to records manufactured and actually sold outside the territorial limitations of the United States of America.

6. The Company will compute such royalties within sixty (60) days after June 30th and December 31st of each year during which records are made hereunder and are sold for the preceding six (6) months period, and will pay such royalties, including any foreign royalties received and credited to the Company's accounts, less any unrecouped advances under this agreement between the Artist and the Company within such sixty (60) days.

7. The royalties on one side of a long playing (33-1/3 rpm) or extended play (45 rpm) microgroove record which embodies on such side another composition or compositions in addition to the composition or compositions performed by the Artist and recorded hereunder shall be computed so as not to penalize the Artist for any such additions; that is the Artist shall receive the full royalty provided in paragraph 4 (b) hereof for records sold within the limitations of the United States of America and one-half (1/2) such amount per side with respect of

records sold outside the limitations of the United States of America.

8. Royalties on phonograph records included in album jackets, boxes or any other style of package or container such as pre-recorded tape shall be based solely upon the record itself.

9. All royalty statements and all other accounts that are rendered by the Company to the Artist shall be binding upon the Artist and not subject to any objection by the Artist for any reason unless specific objection, in writing, stating the basis thereof is given to the Company within one (1) year from the date rendered.

10. The Company shall have the right to use and to allow others to use the Artist's name, likeness and biographical material concerning the Artist for advertising and promotional purposes, in connection with the Artist's phonograph records made pursuant to this agreement. The Company shall not use or authorize direct endorsement by the Artist of any record performance without the Artist's prior written consent. The Company is hereby given the right, during the term of this agreement, to describe the Artist with such phrases as "Company's Exclusive Artist" or similar appropriate phrases.

11. The Artist hereby warrants and represents that he is under no disability, restriction or prohibition in respect to his right to execute this agreement and perform its terms and conditions hereunder, and further, it is hereby certified that the Artist hereunder is an infant, and that therefore the natural guardians of said Artist, namely Anna Pitney and Harold Pitney, have read and co-signed this agreement as principals hereto.

12. The term of this agreement is for a period of two (2) years from the date hereof.

13. At the expiration of the initial term of this agreement the Company shall have the options to extend this agreement for five successive periods of one (1) year each. Such options may be exercised by the Company by giving written notice to the Artist, at least thirty (30) days prior to the expiration of the initial term hereof and each succeeding yearly period hereof, of its intention to continue this agreement for the following yearly period.

During each of such extended periods of one (1) year each the royalties provided for in paragraph 4 (a) hereof shall be equal to five (5%) percent. (a) The Company agrees to pay the Artist a minimum of Five Thousand Dollars ($5,000.00) during the sixth year of this agreement and (b) Ten Thousand Dollars ($10,000.00) during the seventh and last year of this agreement.

14. During each year of this agreement the Artist will perform for the Company for the recording of a minimum of four (4) satisfactory 78 rpm record sides of their equivalent.

15. This agreement shall be governed by and construed under the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have signed and sealed this agreement the day and year first above written.

MUSICOR RECORD CORPORATION

By _____

/s/ Gene Francis Pitney
GENE FRANCIS PITNEY

/s/ Anna Pitney
ANNA PITNEY

/s/ Harold Pitney
HAROLD PITNEY

STATE OF)
: SS.:
COUNTY OF)

ANNA PITNEY and HAROLD PITNEY, being duly sworn, depose and say that they have read the foregoing agreement and that they concur with the terms and conditions therein specified.

/s/ Anna Pitney
ANNA PITNEY

/s/ Harold Pitney
HAROLD PITNEY

Sworn to before me this

7th day of Sept., 1960.

APPENDIX A-2

THE SHIRELLES CONTRACTS – FEBRUARY 15, 1961 AND FEBRUARY 14, 1966

COLLECTIVE EXHIBIT "A"

Dated: Feb. 15, 1961

DORIS COLEY KENNER, ADDIE HARRIS,
BEVERLY LEE and SHIRLEY OWENS,
individually and jointly, doing business as
the "SHIRELLES"

1. This contract for your personal services is made between

SCEPTER MUSIC, INC.

as the Employer, and you individually and severally.

We hereby employ you to render personal services and you agree to render such personal services exclusively for us for the purpose of recording and making records for phonograph records and/or tape recordings and other similar devices for home use.

2. Recordings will be made at recording sessions in the studios we designate at mutually agreeable times. A minimum of 6 sides shall be recorded during the term of this contract, and additional recordings may be made at our election. The musical compositions to be recorded shall be designated by us, and each recording shall be subject to our approval as satisfactory for manufacture and sale. We shall at all times have complete control of the services to be rendered by you under the specifications of this contract.

3. If, during the term of this contract, the minimum number of record sides stated above is not made, then

either you or we may elect to extend the then current year of the term of this contract for a period not in excess of six months, and succeeding years shall be adjusted accordingly; provided, however, that if the failure to make said minimum number of record sides is due to the fault of either party hereto, such defaulting party shall not have such election. Notice of the election to extend the contract pursuant hereto shall be given the other party not less than ten (10) days prior to the expiration of the current term of this contract. In the event such election is not exercised by the party entitled to do so, then neither party hereto shall be liable to the other for failure to make said minimum number of record sides. In the event you make such an election and we do not desire to so extend the agreement, our liability with respect to such unrecorded minimum sides shall be limited to $25.00 per record side not so recorded, or the minimum applicable union scale, for your services, whichever is greater. In the event the making of recordings and/or the manufacturing of records is curtailed, suspended, stopped or otherwise adversely affected by government action, war, strike, flood, or similar causes beyond our control, we shall have the right to reduce the record sides to be recorded as specified in Section 2 above proportionately in relation to the length of time that such conditions shall remain in effect, or we may elect to extend the contract for a period of time equal to the curtailment, suspension or stoppage.

4. For the rights herein granted and the services to be rendered by you we shall pay you as royalty a sum equal to 4 % of the net retail list price in the United States of

American based on 90% of all double-faced records manufactured and sold by us and paid for, on both faces of which are embodied only the selections recorded hereunder; and one-half of the respective amounts of such royalties of 90% of all records manufactured and sold by us and paid for on only one face of which are embodied only the selections recorded hereunder. In the case of phonograph records and other copies manufactured and sold in foreign countries by any subsidiary, affiliate, licensee or nominees to whom we have supplied a copy or duplicate of a master or matrix or tape of any such recordings, we will pay you one-half of the United States of America royalty rate out of all net license fees paid and received by us for phonograph records and other copies so manufactured and sold. Royalties for records sold by us and paid for outside of the United States of America are to be computed in the national currency of the country where the net retail list prices above mentioned apply, or the net retail price in England, at our election, and are to be payable only with respect to records for which we receive payment in the United States of America, in dollar equivalent and in the dollar equivalent at the rate of exchange at the time we receive payment in the United States of America. Royalties on phonograph records, tape recordings and other copies included in albums, jackets, boxes, or other types of package or container shall be based solely upon the net retail list price, exclusive of all taxes, for replacement records. Within fourteen (14) days after approval of each record side we will pay for the services of accompanying musicians, vocalists, arrangers, copyists and other costs of recording hereunder, and such payments shall be advances against your royalties.

In the case of phonograph records and/or other copies sold as Club editions, your royalties shall be one-half of the rate otherwise due hereunder.

You shall not be entitled to any royalties for any records given away by us or our lessees or licensees without charge to any persons including distributors for the purpose of exploiting your name and talents or for the purpose of promoting the subject records.

5. Payment of accrued royalties accompanied by statements shall be made semi-annually, within 60 days after June 30th for the six-month period ending June 30th, and within 60 days after December 31st for the six-month period ending December 31st in each year. However, we shall have the right to deduct from the amount of royalties due all advances against royalties.

6. In the event that a new medium shall be used for reproductions of your recordings hereunder or of your recordings heretofore made, we will pay you a royalty based upon the net retail list price of each unit sold. The rate of such royalty shall be determined by the applicable agreements between us relating to the making of such recordings.

7. During the term of this agreement, and all renewals and extensions thereof, you will not perform for the purpose of making phonograph records for any persons, firm or corporation other than us, your services for such purposes being exclusive with us, and you will not perform any musical composition recorded hereunder for any other person, firm or corporation for the purpose of making phonograph records, within five (5) years after the termination of this agreement, including any option

periods. You also recognize that we are affiliated with various music publishing companies. In further consideration of our covenants as contained in this agreement, you hereby agree that for the duration of this contract and any and all extensions, substitutions or renewals you will not engage in any business competitive with us or with any of our music publishing affiliates either as an owner, partner or stockholder of any corporation.

8. All recordings and all records and reproductions made therefrom together with the performances embodied therein, shall be entirely our property, free of any claims whatsoever by you or any person deriving any rights or interest from you. Without limitation of the foregoing, we shall have the right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings by any method now or hereafter known, and to sell and deal in the same under any trade mark or trade names or labels designated by us, or we may at our election refrain therefrom.

9. We shall have the right to use and to allow others to use your name(s), facsimile signature(s) and likeness(es) and your biographical material for advertising and purposes of trade, or to refrain therefrom, in connection with the phonograph records, tape recordings and other similar devices for home use, made pursuant to this agreement. You agree that during the term of this agreement you will not permit or authorize anyone other than us to use your name(s), signature(s) or likeness(es) in connection with the making, advertising or marketing of any

phonograph records, except phonograph records previously made by you under prior agreements with other recording companies.

10. You further agree that your services are of such unique and extraordinary character that in the event of a breach of this agreement by you, we shall be entitled to the extreme limits of the equitable relief of injunction in addition to all rights which we may have in Law or Equity.

11. We may at our election assign this contract or any masters made hereunder. This contract cannot be changed or modified orally. The word "person" in this contract means and includes any individual, partnership, firm, association or organization, whether or not incorporated or operating for profits. This contract shall inure to the benefit of our successors and assigns.

12. The term of this agreement shall be for one (1) year beginning with the date of this agreement.

13. In the event you record a musical selection in which you have an interest, direct or indirect, in such musical selection or any copyright thereof, the copyright royalty payable by us on such selection shall be 1-1/2 cents per selection per record side. We shall not pay any copyright royalty on a public domain selection recorded by you in which you have any interest, direct or indirect, or in any copyrighted arrangement thereof.

14. We agree to pay an advance of $ Union Scale per record side, which payment shall be charged against your royalties.

15. You grant us the option to renew this agreement for four (4) additional periods of one year each upon all the terms and conditions herein contained, except as follows:

a) First option period
Minimum sides 6
Royalty 5%

b) Second option period
Minimum sides 6
Royalty 5%

c) Third option period
Minimum sides 6
Royalty 5%

d) Fourth option period
Minimum sides 6
Royalty 5%

15. (a) it is understood that you have heretofore recorded records for us under previously existing agreements. Such recordings shall come under the terms of this agreement, and you shall be paid at the rate described in Paragraph 4 of this agreement.

Each renewal period shall commence at the expiration of the previous term of this agreement, unless it shall have been extended, in which event the renewal term shall commence at the latest expiration date of any such extension. Each option may be exercised by written notice to your last known mailing address mailed to you not later than ten (10) days prior to the expiration of the previous term of this agreement or any extension thereof, and upon such notice being given, this contract shall be deemed to have been renewed for such additional period.

16. In the event any of the terms and conditions of this agreement are in derogation of any terms and conditions required by any Guild or Union having jurisdiction over you and us, and you give us written notice to such effect, and we do not agree to modify this agreement to such

Union or Guild requirements within sixty (60) days thereafter, then you shall have the right to terminate this agreement as of the end of the sixty (60) day period and we shall have no further liability to you, except with respect to royalties due or to become due you hereunder for recordings made prior to the termination of said agreement, or any extension thereof.

Your signature(s) below, on the line marked "Agreed To and Accepted", and your and our initials upon any Riders hereto annexed, shall constitute this contract a valid and binding agreement between us.

Very truly yours,

SCEPTER MUSIC, INC.

By illegible

Agreed To and Accepted:

/s/ Beverly Lee

/s/ Addie Harris

/s/ Shirley Owens

/s/ Doris Coley Kenner

Individually and as members of a group known as the "SHIRELLES"

App. 15

Dated: December 1965
As of February 14, 1966

Beverly Lee	)	Individually and Collectively Known as the "SHIRELLES"
Doris Coley Kenner	)	
Addie Harris	)	
Shirley Owens Alston	)	

1. This contract for your personal services is made between

Scepter Records, Inc.

as the Employer, and you.

We hereby employ you to render personal services and you agree to render such personal services exclusively for us for the purpose of recording and making records for phonograph records and/or tape recordings and other similar devices (excluding transcriptions).

2. Recordings will be made at recording sessions in the studios we designate at mutually agreeable times. A minimum of 8 sides shall be recorded during the term of this contract, and additional recordings may be made at our election. The musical compositions to be recorded shall be designated by us, and each recording shall be subject to our approval as satisfactory for manufacture and sale. We shall at all times have complete control of the services to be rendered by you under the specifications of this contract.

3. If, during the term of this contract, the minimum number of record sides stated above is not made, then either you or we may elect to extend the then current year of the term of this contract for a period not in excess

of six months, and succeeding years shall be adjusted accordingly; provided, however that if the failure to make said minimum number of record sides is due to the fault of either party hereto, such defaulting party shall not have such election. Notice of the election to extend the contract pursuant hereto shall be given the other party not less than ten (10) days prior to the expiration of the current term of this contract. In the event such election is not exercised by the party entitled to do so, then neither party hereto shall be liable to the other for failure to make said minimum of record sides. In the event you make such an election and we do not desire to so extend the agreement, our liability with respect to such unrecorded minimum sides shall be limited to Twenty Five ($25.00) Dollars per record side not so recorded or the minimum applicable union scale, for your services whichever is greater. In the event the making of recordings and/or the manufacturing of records is curtailed, suspended, stopped or otherwise adversely affected by government action, war, strike, flood, or similar causes beyond our control, we shall have the right to reduce the record sides to be recorded as specified in Section 2 above proportionately in relation to the length of time that such conditions shall remain in effect, or we may elect to extend the contract for a period of time equal to the curtailment, suspension or stoppage.

4. For the rights herein granted and the services to be rendered by you we shall pay you as royalty a sum equal to 5% of the net retail list price in the United States of America based on ninety (90%) per cent of all double-faced records manufactured and sold by us and paid for, on both faces of which are embodied only the selections

recorded hereunder; and one-half (1/2) of the respective amounts of such royalties of ninety (90%) per cent of all records manufactured and sold by us and paid for on only one face of which are embodied only the selections recorded hereunder. In the case of phonograph records and other copies manufactured and sold in foreign countries by any subsidiary, affiliate, licensee or nominees to whom we have supplied a copy or duplicate of a master or matrix or tape of any such recordings, we will pay you one-half of the United States of America royalty rate out of all net license fees paid and received by us for phonograph records and other copies so manufactured and sold. Royalties for records sold by us and paid for outside of the United States of America are to be computed in the national currency of the country where the net retail list prices above mentioned apply, or the net retail price in England, at our election, and are to be payable only with respect to records for which we receive payment in the United States of America, in dollar equivalent and in the dollar equivalent at the rate of exchange at the time we receive payment in the United States of America. Royalties on phonograph records, tape recordings and other copies included in albums, jackets, boxes, or other types of package or container shall be based solely upon the net retail list price, exclusive of all taxes, for replacement records. Within fourteen (14) days after approval of each record side we will pay for the services of accompanying musicians, vocalists, arrangers, copyists and other costs of recording hereunder, and such payments shall be advances against your royalties.

Royalties applicable to records sold through Record Clubs shall be fifty (50%) per cent of the applicable

royalty except that no royalties shall be paid on records shipped free of charge to record club members or as inducement to prospective members. Royalties applicable to 12" Long Playing disc type records for which the list price upon which discounts are computed by us is $2.00 or less per record shall be fifty (50%) per cent of the applicable royalty but not more than two (2%) per cent.

No royalties will be payable either on records furnished as free and bonus records or on records issued for promotional purposes shipped on a no-charge basis to independent distributors, dealers or any other person or on records sold at less than our cost of producing and manufacturing the said records. Royalties applicable to records sold under special merchandising plans or otherwise, at less than the regular wholesale price applicable to such records or applicable to records of that type in the record industry shall be reduced in the same proportion as the regular wholesale price was reduced on such sales.

As to each master which you record hereunder jointly with another artist whose compensation for such recording is based on a royalty and as to records which are manufactured therefrom, your royalties shall be reduced by fifty (50%) per cent and only fifty (50%) per cent of the payments set forth hereunder in connection with such masters shall be charged against your royalties when earned. In the case of Long Playing albums in which the records performed by you hereunder are included with the recordings of other artists, the royalties payable to you shall be based upon that portion of the retail selling price as the number of compositions recorded by you bears to the total recordings on such Long Playing record.

5. Payment of accrued royalties accompanied by statements shall be made semi-annually, within sixty (60) days after June 30th for the six-month period ending June 30th, and within sixty (60) days after December 31st for the six-month period ending December 31st, in each year. However, we shall have the right to deduct from the amount of royalties due all advances against royalties. Such statement shall be binding upon you one (1) year after it has been rendered to you unless you have objected to it in writing during such period of time.

6. In the event that a new medium shall be used for reproductions of your recordings hereunder or of your recordings heretofore made, we will pay you a royalty based upon the net retail list price of each unit sold. The rate of such royalty shall be determined by the applicable agreements between us relating to the making of such recordings.

7. During the term of this agreement, and all renewals and extensions thereof, you will not perform for the purpose of making phonograph records for any persons, firm or corporation other than us, your services for such purposes being exclusive with us, and you will not perform any musical composition recorded hereunder for any other person, firm or corporation for the purpose of making phonograph records within five (5) years after the termination of this agreement, including any option periods.

8. All recordings and all records and reproductions made therefrom together with the performances embodied therein, shall be entirely our property, free of any claims whatsoever by you or any person deriving any

rights or interest from you. Without limitation of the foregoing, we shall have the right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings by any method now or hereafter known, and to cause the public performance thereof without payment to you, and to sell and deal in the same under any trade mark or trade names or labels designated by us, or we may at our election refrain therefrom.

9. We shall have the right to use and to allow others to use your name(s), facsimile signature(s) and likeness(es) and your biographical material for advertising and purposes of trade, or to refrain therefrom, in connection with the phonograph records, tape recordings and other similar devices for home use, made pursuant to this agreement. You agree that during the term of this agreement you will not permit or authorize anyone other than us to use your name(s), signature(s) or likeness(es) in connection with the making, advertising or marketing of any phonograph records, except phonograph records previously made by you under prior agreements with other recording companies.

10. You further agree that your services are of such unique and extraordinary character that in the event of a breach of this agreement by you, we shall be entitled to the extreme limits of the equitable relief of injunction in addition to all rights which we may have in Law or Equity.

11. We may at our election assign this contract or any masters made hereunder. This contract cannot be changed or modified orally. The word "person" in this

contract means and includes any individual, partnership, firm, association or organization, whether or not incorporated or operating for profits. This contract shall inure to the benefit of our successors and assigns.

12. The term of this agreement shall be for one (1) year beginning with the date of this agreement.

13. In the event you record a musical selection in which you have an interest, direct or indirect, in such musical selection or any copyright thereof, the copyright royalty payable by us on such selection shall be one and one-half (1-1/2¢) cents per selection per record side. We shall not pay any copyright royalty on a public domain selection recorded by you in which you have any in terest [sic], direct or indirect, or in any copyrighted arrangement thereof.

14. We agree to pay an advance of $ None per record side, which payment shall be charged against your royalties. * See Rider

15. You grant us the option to renew this agreement for two (2) additional periods of one (1) year each upon all the terms and conditions herein contained, except as follows:

a) First option period

Minimum sides 8

Royalty 5%

b) Second option period

Minimum sides 8

Royalty 5%

c) Third option period

Minimum sides _____

Royalty _____

d) Fourth option period

Minimum sides _____

Royalty _____

Each renewal period shall commence at the expiration of the previous term of this agreement, unless it shall have been extended, in which event the renewal term shall commence at the latest expiration date of any such extension. Each option may be exercised by written notice to your last known mailing address mailed to you not later than ten (10) days prior to the expiration of the previous term of this agreement or any extension thereof, and upon such notice being given, this contract shall be deemed to have been renewed for such additional period.

16. If this agreement covers the services of two or more artists, then the agreement shall be binding upon each artist as if each had entered into a separate agreement with us under the same terms and conditions as are set forth herein, except that the royalties payable to each of said artists shall be divided by the number of artists whose performances are embodied in any, selection recorded hereunder and for which the artist is entitled to royalties under this agreement. We specifically reserve the right to record any artist signing this agreement as a single artist at anytime, and for any number of sides at our discretion. If any such artist performs as a single artist under this agreement, he shall receive royalties on such recordings based on the full rate set forth in Paragraph "4" hereof. The election by us to so record one or

two members of a group of artists who have signed this agreement, shall not relieve us of the obligation to record the minimum sides of the group in accordance with Paragraphs "2", "3" & "15" of this agreement. In addition, it is agreed that any replacement or replacements for any of you, or additions to the group, shall be subject to our prior written approval, and upon such written approval, such replacement, replacements or additions to the group must become parties to our exclusive recording agreement with you.

17. In the event any of the terms and conditions of this agreement are in derogation of any terms and conditions required by any Guild or Union having jurisdiction over you and us, and you give us written notice to such effect, and we do not agree to modify this agreement to such Union or Guild requirements within sixty (60) days thereafter, then you shall have the right to terminate this agreement as of the end of the sixty (60) day period and we shall have no further liability to you, except with respect to royalties due or to become due you hereunder for recordings made prior to the termination of said agreement, or any extension thereof.

18. You agree that you are or that you will promptly become a member of AFTRA in good standing, subject to and in accordance with the union security provisions of the AFTRA Code of Fair Practice for phonograph recordings.

Your signature(s) below, on the line marked "Agreed To and Accepted", and your and our initials upon any

Riders hereto annexed, shall constitute this contract a valid and binding agreement between us.

Very truly yours,
SCEPTER RECORDS, INC.
By /s/ Florence Greenberg

Agreed To and Accepted:

/s/ Addie Harris)
/s/ Beverly Lee) Individually and
/s/ Shirley O. Alston) Collectively
/s/ Doris Coley Kenner) Known as the
) "SHIRELLES"

RIDER

1. The Shirelles acknowledge receipt of a general advance in the amount of $10,000.00 which shall be an advance against royalties accruing under the within contract. Scepter Records, Inc. shall have no right to exercise any option contained in the within agreement unless simultaneously with the exercise of such option, they shall forward to the Shirelles the sum of $2500.00 to each of the Shirelles or a total of $10,000.00 as a further general advance against royalties.

2. Prior hereto, the Shirelles and Scepter Records, Inc. and others entered into a stipulation settling a law suit theretofore brough [sic] by the Shirelles. As of the date of such settlement which was March 16, 1965, the Shirelles were indebted to Scepter Records, Inc. pursuant to such settlement in the total sum of $31,261.58. Such

sum as it may have increased or decreased by transactions after the date of such settlement may be recouped by Scepter Records, Inc. only from royalties payable to the Shirelles from recordings of the Shirelles made pursuant to prior contracts and not from royalties accruing pursuant to this contract.

3. It is agreed that Scepter Records, Inc. shall designate the producer be employed for the purpose of producing the records of the Shirelles to be made here under but such selection shall be subject to the reasonable approval of the Shirelles. It is initially agreed that Gene Paige is a producer acceptable to the Shirelles.

Scepter Records, Inc.

By /s/ Beverly Lee

Individually and Collectively Known as the "SHIRELLES"

(Shirley O. Alston

(Doris C. Kenner

(Addie Harris

(

(_____

APPENDIX A-3
B.J. THOMAS CONTRACT – APRIL 22, 1968

Dated: April 22, 1968

Mr. B. J. Thomas

1. This contract for your personal services is made between

SCEPTER RECORDS, INC.

as the Employer, and you.

We hereby employ you to render personal services and you agree to render such personal services exclusively for us for the purpose of recording and making records for phonograph records and/or tape recordings and other similar devices (excluding transcriptions).

2. Recordings will be made at recording sessions in the studios we designate at mutually agreeable times. A minimum of 8 sides shall be recorded during the term of this contract, and additional recordings may be made at our election. The musical compositions to be recorded shall be designated by us, and each recording shall be subject to our approval as satisfactory for manufacture and sale. We shall at all times have complete control of the services to be rendered by you under the specifications of this contract.

3. If, during the term of this contract, the minimum number of record sides stated above is not made, then either you or we may elect to extend the then current year of the term of this contract for a period not in excess of six months, and succeeding years shall be adjusted accordingly; provided, however, that if the failure to make said minimum numbers of record sides is due to the

fault of either party hereto, such defaulting party shall not have such election. Notice of the election to extend the contract pursuant hereto shall be given the other party not less than ten (10) days prior to the expiration of the current term of this contract. In the event such election is not exercised by the party entitled to do so, then neither party hereto shall be liable to the other for failure to make said minimum of record sides. In the event you make such an election and we do not desire to so extend the agreement, our liability with respect to such unrecorded minimum sides shall be limited to Twenty Five ($25.00) Dollars per record side not so recorded, or the minimum applicable union scale, for your services, whichever is greater. In the event the making of recordings and/or the manufacturing of records is curtailed, suspended, stopped or otherwise adversely affected by government action, war, strike, flood or similar causes beyond our control, we shall have the right to reduce the record sides to be recorded as specified in Section 2 above proportionately in relation to the length of time that such conditions shall remain in effect, or we may elect to extend the contract for a period of time equal to the curtailment, suspension or stoppage.

4. For the rights herein granted and the services to be rendered by you we shall pay you as royalty a sum equal to 5 % of the net retail list price in the United States of America based on ninety (90%) per cent of all double-faced records manufactured and sold by us and paid for, on both faces of which are embodied only the selections recorded hereunder; and one-half (1/2) of the respective amounts of such royalties of ninety (90%) per cent of all records manufactured and sold by us and paid for on

only one face of which are embodied only the selections recorded hereunder. In the case of phonograph records and other copies manufactured and sold in foreign countries by any subsidiary, affiliate, licensee or nominees to whom we have supplied a copy or duplicate of a master or matrix or tape of any such recordings, we will pay you one-half (1/2) of the United States of America royalty rate out of all net license fees paid and received by us for phonograph records and other copies so manufactured and sold. Royalties for records sold by us and paid for outside of the United States of America are to be computed in the national currency of the country where the net retail list prices above mentioned apply, or the net retail price in England, at our election, and are to be payable only with respect to records for which we receive payment in the United States of America, in dollar equivalent and in the dollar equivalent at the rate of exchange at the time we receive payment in the United States of America. Royalties on phonograph records, tape recordings and other copies included in albums, jackets, boxes, or other types of package or container shall be based solely upon the net retail list price, exclusive of all taxes, for replacement records. Within fourteen (14) days after approval of each record side we will pay for the services of accompanying musicians, vocalists, arrangers, copyists and other costs of recording hereunder, and such payments shall be advances against your royalties.

Royalties applicable to pre-recorded tapes and to tapes and records sold through Record Clubs shall be fifty (50%) per cent of the applicable royalty except that no royalties shall be paid on tapes and records shipped free of charge to Record Club members or as inducement

to prospective members. Royalties applicable to 12" Long Playing disc type records for which the list price upon which discounts are computed by us is $2.00 or less per record shall be fifty (50%) per cent of the applicable royalty but not more than two (2%) per cent.

No royalties will be payable either on tapes and records furnished as free and bonus records or on tapes and records issued for promotional purposes shipped on a no-charge basis to independent distributors, dealers or any other person or on tapes and records sold at less than our cost of producing and manufacturing them. Royalties applicable to tapes and records sold under special merchandising plans or otherwise, at less than the regular wholesale price applicable to such tapes and records or applicable to tapes and records of that type in the recording industry shall be reduced in the same proportion as the regular wholesale price was reduced on such sales.

As to each master which you record hereunder jointly with another artist whose compensation for such recording is based on a royalty and as to records which are manufactured therefrom, your royalties shall be reduced by fifty (50%) per cent and only fifty (50%) per cent of the payments set forth hereunder in connection with such masters shall be charged against your royalties, when earned. In the case of Long Playing albums in which the records performed by you hereunder are included with the recordings of other artists, the royalties payable to you shall be based upon that portion of the retail selling price as the number of compositions recorded by you bears to the total recordings on such Long Playing record.

5. Payment of accrued royalties accompanied by statements shall be made semi-annually, within sixty (60) days after June 30th for the six-month period ending June 30th, and within sixty (60) days after December 31st for the six-month period ending December 31st, in each year. However, we shall have the right to deduct from the amount of royalties due all advances against royalties. Such statement shall be binding upon you one (1) year after it has been rendered to you unless you have objected to it in writing during such period of time.

6. In the event that a new medium shall be used for reproductions of your recordings hereunder or of your recordings heretofore made, we will pay you a royalty based upon the net retail list price of each unit sold. The rate of such royalty shall be determined by the applicable agreements between us relating to the making of such recordings.

7. During the term of this agreement, and all renewals and extensions thereof, you will not perform for the purpose of making phonograph records for any persons, firm or corporation other than us, your services for such purposes being exclusive with us, and you will not perform any musical composition recorded hereunder for any other person, firm or corporation for the purpose of making phonograph records within five (5) years after the termination of this agreement, including any option periods.

8. All recordings and all records and reproductions made therefrom together with the performances embodied therein, shall be entirely our property, free of any claims whatsoever by you or any person deriving any

rights or interest from you. Without limitation of the foregoing, we shall have the right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings by any method now or hereafter known, and to cause the public performance thereof without payment to you, and to sell and deal in the same under any trade mark or trade names or labels designated by us, or we may at our election refrain therefrom.

9. We shall have the right to use and to allow others to use your name(s), facsimile signature(s) and likeness(es) and your biographical material for advertising and purposes of trade, or to refrain therefrom, in connection with the phonograph records, tape recordings and other similar devices for home use, made pursuant to this agreement. You agree that during the term of this agreement you will not permit or authorize anyone other than us to use your name(s), signature(s) or likeness(es) in connection with the making, advertising or marketing of any phonograph records, except phonograph records previously made by you under prior agreements with other recording companies.

10. You further agree that your services are of such unique and extraordinary character that in the event of a breach of this agreement by you, we shall be entitled to the extreme limits of the equitable relief of injunction in addition to all rights which we may have in Law or Equity.

11. We may at our election assign this contract or any masters made hereunder. This contract cannot be changed or modified orally. The word "person" in this

contract means and includes any individual, partnership, firm, association or organization, whether or not incorporated or operating for profits. This contract shall inure to the benefit of our successors and assigns.

12. The term of this agreement shall be for One Year beginning with the date of this agreement.

13. In the event you record a musical selection in which you have an interest, direct or indirect, in such musical selection or any copyright thereof, the copyright royalty payable by us on such selection shall be one and one-half (1-1/2¢) cents per selection per record side. We shall not pay any copyright royalty on a public domain selection recorded by you in which you have any in terest [sic] , direct or indirect, or in any copyrighted arrangement thereof.

14. We agree to pay an advance of $ Union Scale per record side, which payment shall be charged against your royalties.

15. You grant us the option to renew this agreement for FOUR additional periods of one (1) year each upon all the terms and conditions herein contained, except as follows:

a) First option period

Minimum sides 8

Royalty 5%

b) Second option period

Minimum sides 8

Royalty 5%

c) Third option period

Minimum sides 8

Royalty 5%

d) Fourth option period

Minimum sides 8

Royalty 5%

Each renewal period shall commence at the expiration of the previous term of this agreement, unless it shall have been extended, in which event the renewal term shall commence at the latest expiration date of any such extension. Each option shall be seemed exercised by us, without any notice to you. In the event we do not desire to exercise an option, we shall notify you to that effect at least ten (10) days prior to the expiration of the then current term of the agreement. If you are not so notified, the contract shall be deemed automatically extended.

16. If this agreement covers the services of two or more artists, then the agreement shall be binding upon each artist as if each had entered into a separate agreement with us under the same terms and conditions as are set forth herein, except that the royalties payable to each of said artists shall be divided by the number of artists whose performances are embodied in any selection recorded hereunder and for which the artist is entitled to royalties under this agreement. We specifically reserve the right to record any artist signing this agreement as a single artist at anytime, and for any number of sides at our discretion. If any such artist performs as a single artist under this agreement, he shall receive royalties on

such recordings based on the full rate set forth in Paragraph "4" hereof. The election by us to so record one or two members of a group of artists who have signed this agreement, shall not relieve us of the obligation to record the minimum sides of the group in accordance with Paragraphs "2", "3" & "15" of this agreement. In addition, it is agreed that any replacement or replacements for any of you, or additions to the group, shall be subject to our prior written approval, and upon such written approval, such replacement, replacements or additions to the group must become parties to our exclusive recording agreement with you.

17. In the event any of the terms and conditions of this agreement are in derogation of any terms and conditions required by any guild or Union having jurisdiction over you and us, and you give us written notice to such effect, and we do not agree to modify this agreement to such Union or guild requirements within sixty (60) days thereafter, then you shall have the right to terminate this agreement as of the end of the sixty (60) day period and we shall have no further liability to you, except with respect to royalties due or to become due you hereunder for recordings made prior to the termination of said agreement, or any extension thereof.

18. You agree that you are or that you will promptly become a member of AFTRA in good standing, subject to and in accordance with the union security provisions of the AFTRA Code of Fair Practice for phonograph recordings.

Your signature(s) below, on the line marked "Agreed To and Accepted", and your and our initials upon any

Riders hereto annexed, shall constitute this contract a valid and binding agreement between us.

Very truly yours,

SCEPTER RECORDS, INC.

By /s/ (illegible)

Agreed To and Accepted:

/s/ B. J. Thomas

B. J. Thomas

* RIDER – Paragraph 12

the expiration of your present contract with Music Enterprises, Inc. It is understood and agreed that upon such expiration or termination for any reason whatsoever this contract shall immediately come into full force and effect. Until such termination or expiration you will render your services to Music Enterprises, Inc. pursuant to the terms of your contract with them. We agree that we will use our best efforts to secure permission to make payments of your royalties directly to you.

/s/ B J T (illegible)

APPENDIX B

No. 90-5988/6445

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

B.J. THOMAS, ET AL., Plaintiffs-Appellees,	)	
v.	)	ORDER
GUSTO RECORDS, INC.; G.M.L., INC., Defendants-Appellants	)	(Filed Sept. 13, 1991)

BEFORE: KENNEDY and MARTIN, Circuit Judges; and ENGEL, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Kennedy would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

B.J. THOMAS; Gene F. Pitney; Shirley Owens Alston; Doris Coley Jackson; Beverly Lee; Vernon McFadden, Jr., Plaintiffs-Appellees,

v.

GUSTO RECORDS, INC.; G.M.L., Inc., Defendants-Appellants.

Nos. 90-5988, 90-6445.

United States Court of Appeals,
Sixth Circuit.

Argued May 10, 1991.

Decided July 29, 1991.

Recording artists brought suit against owners of master recordings to recover royalty payments. The United States District Court for the Middle District of Tennessee, Thomas A. Higgins, J., entered judgment in favor of the recording artists, and the defendants appealed. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that: (1) contracts of recording artists, which were silent with respect to royalties from domestic licensing, did not prevent court from considering evidence concerning industry custom and practice in determining royalties from domestic licensing; (2) royalty agreements between recording artists and owner of master recordings entitled artists to receive royalties at a rate of 50 percent on foreign licensing income; (3) owners of master recordings were liable under Tennessee law to recording artist for royalties incurred by the prior owners of the masters; and (4) incremental increase in damages was warranted where "unorthodox" recordkeeping practices of owners of master recordings prevented precise calculation of damages.

Affirmed.

Kennedy, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Ira G. Greenberg (argued), Summit, Robins & Feldesman, New York City, Samuel D. Lipshie, Boult, Cummings, Conners & Berry, Nashville, Tenn., for plaintiffs-appellees.

Jay S. Bowen (argued), Nancy A. Min, J. Mark Tipps, Bass, Berry & Sims, Grant Smith, Smith & Thompson, Nashville, Tenn., for defendants-appellants.

Before KENNEDY and MARTIN, Circuit Judges; and ENGEL, Senior Circuit Judge.

BOYCE F. MARTIN, Jr., Circuit Judge.

All the plaintiffs in this diversity action, except for Vernon McFadden who is the widower and personal representative of Addie Harris McFadden, have the unusual status of being successful popular musicians. They brought suit against Gusto Records, Inc., and G.M.L., Inc. in this Tennessee diversity action seeking royalties from the use of master recordings of their songs. Essentially, this is a breach of contract action. The case was tried without a jury and the district court awarded the plaintiffs a total of $843,209.89 plus pre-judgment interest for failure to pay royalties due. Gusto and G.M.L. have appealed this judgment. The defendants do not dispute they are liable; they merely contend the amount owed is far less than the amount awarded by the district court. For the reasons which follow, we affirm.

As the district court noted, the musicians in this suit have achieved a high degree of success in "popular

music." B.J. Thomas is most famous for his recording of the them song for the movie "Butch Cassidy and the Sundance Kid," "Rain Drops Keep Fallin' on My Head." Burt Bacharach and Hal Davis wrote the song originally for Bob Dylan to record. Thomas also had a number one hit with "Another Somebody Done Somebody Wrong Song." Among his accolades are eleven gold records, two platinum albums, and five Grammy awards.

Shirley Owens Alston, Doris Coley Jackson, Beverly Lee and Addie Harris McFadden, members of a singing group known as the Shirelles, had their first hit, "I Met Him on a Sunday," in 1958 while they were still attending high school in New Jersey. One year later the group was successful with "Dedicated to the One I Love." Among their accolades are twelve top ten hits, including two number ones: "Soldier Boy" and "Will You Still Love Me Tomorrow," a song recently repopularized by its use in the move "Dirty Dancing."

Gene Pitney's most successful song, "Only Love Can Break a Heart," reached number two on the popular charts in 1962. Pitney was especially successful singing movie theme songs, "A Town Without Pity" and "(The Man Who Shot) Liberty Valance," and writing songs for other popular songs, including "Rubber Ball" for Bobby Vee, "Hello Mary Lou" for Ricky Nelson, and "He's a Rebel" for the Crystalls.

As the district court aptly noted, record companies transferred the master recordings of the plaintiffs' songs through "mesne conveyances," until G.M.L. purchased them in the mid-1980's. G.M.L. owned the masters, while Gusto sold copies of them for the retail trade. Mr. Gayron

"Moe" Lytle is the president, sole shareholder, and sole director of Gusto and G.M.L.

Gusto and G.M.L. concede that an owner of the master recordings incurs any royalty obligations that arise during its ownership. Defendants make this concession after having profited throughout most of the 1980's from sales and licensure of the plaintiffs' masters without much regard to this obligation. In fact, this stance of neglecting the plaintiffs' rights was consistent with the record companies who owned the plaintiffs' master recordings through much of the 1970's and throughout the 1980's.

The district court found after a five day trial that Pitney should recover $187,762.44 plus interest, that Thomas should recover $177,299.77 plus interest, and that each member of the Shirelles should recover $119,537.07 plus interest. In reaching these amounts the district court accepted, with minor exceptions, the plaintiffs' expert's testimony on custom and usage in the music industry. Most importantly, the court accepted his testimony that, absent a contractual provision to the contrary, the musician receives half of the fees received from licensing the masters to unaffiliated third parties. The trial court's decision was also based in large part upon the unseemly record keeping practices of Gusto, which forever prevent an exact determination of royalties earned by the plaintiffs. Gusto and G.M.L. timely filed this appeal.

The defendants assert the trial court erred on numerous grounds. First, they argue that clear language in the contracts of B.J. Thomas and the Shirelles prevents the consideration of evidence concerning industry custom

and practice in determining royalties from domestic licensing. Thomas and the Shirelles entered into contracts with Scepter Records, Inc. in 1968 and 1961, respectively. The provisions of the two contracts in question are identical, except as to the royalty rate, and provide the following:

> 4. For the rights herein granted and the service to be rendered by you we shall pay you as royalty a sum equal to [4% for the Shirelles] [5% for Thomas] of the net retail list price in the United States of America based on 90% of all double-faced records manufactured and sold by us and paid for, on both faces of which are embodied only the selections recorded hereunder; and one-half of the respective amounts of such royalties of 90% of all records manufactured and sold by us and paid for on only one face of which are embodied only the selections recorded hereunder. In the case of phonograph records and other copies manufactured and sold in foreign countries by any subsidiary, affiliate, licensee or nominees to whom we have supplied a copy or duplicate of a master or matrix or tape of any such recordings, we will pay you one-half of the United States of America royalty rate out of all net license fees paid and received by us for phonograph records and other copies so manufactured and sold.
>
> . . . .
>
> 8. All recordings and all records and reproductions made therefrom together with the performances embodied therein, shall be entirely our property, free of any claims whatsoever by you or any person deriving any rights or interest from you. Without limitation of the foregoing,

> we shall have the right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings by any method now or hereafter known, and to sell and deal in the same under any trade mark or trade names or labels designated by us, or we may at our election refrain therefrom.
>
> . . . .

Gusto and G.M.L. assert that paragraph four is unambiguous with regard to royalties from domestic licensing, arguing that the "obvious implication" of silence on the issue is that the parties agreed there would be no such royalties. We do not find that implication so obvious.

Both parties agree that New York law should be applied to resolve this issue. The resolution of any ambiguity in a written contract is to be determined by the court as a matter of law. *Schuler-Haas Electric Co. v. Aetna Casualty & Surety Co.*, 40 N.Y.2d 883, 389 N.Y.S.2d 348, 357 N.E.2d 1003 (1976). Not only are these contracts silent on many issues, e.g. domestic licensing royalties, many of the provisions which the contracts do set forth are perfectly obscure. Paragraph eight of both contracts, for example, if read independently, could be interpreted as a provision in which Thomas and the Shirelles signed away any and all rights. Indeed, the defendants assert this is what the paragraph means with respect to royalties from domestic licensing. Without an integration clause or more evidence in the documents supporting this harsh interpretation, we cannot accept this reading of the contracts. Because of the ambiguities in these contracts, we believe

the district court properly looked beyond the written contract to determine the true intentions of the parties.

New York cases have consistently held that custom may be used to clarify ambiguities or to "fill gaps" in an agreement. *E.g., Tannenbaum v. Zeller,* 552 F.2d 402, 414 (2d Cir.), *cert. denied,* 434 U.S. 934, 98 S.Ct. 421, 54 L.Ed.2d 293 (1977); *Franklin Research & Dev. Corp. v. Swift Elec. Supply Co.,* 340 F.2d 439, 443 n. 2 (2d Cir. 1964). Gusto asserts these cases are inapposite because custom and practice cannot be used to contradict the express terms of the contracts. *See, e.g., Western Union Tel. Co. v. American Communications Ass'n,* 299 N.Y. 177, 86 N.E.2d 162 (1949). The problem with this argument is that the contracts in question are silent with respect to royalties from domestic licensing; there are no express terms in the contracts explaining the parties' intentions on this issue. Paragraph 4 sets forth the royalty rate on the record company's own sales and on *foreign* sales by "any subsidiary, affiliate, licensee or nominee[ ]. . . . " Paragraph 8 merely establishes the record company's title free of any claim to ownership by the artists. Because no provision in the contracts of B.J. Thomas or the Shirelles pertains to royalties from domestic licensing income which could be contradicted by incorporating into the contracts the custom in the music industry with respect to that issue, the district court properly accepted the fifty percent royalty rate as the rate intended by the parties.

Gusto and G.M.L. next argue that the district court incorrectly calculated the royalty rate for foreign license income. They assert that the royalty rate designated for foreign sales by "subsidiar[ies], affiliate[s], licensee[s], or nominees" set forth in paragraph four dictates a much

lower rate than the fifty percent rate used by the district court. The clause in question provides a royalty rate based upon recordings manufactured and sold outside the United States "by any subsidiary, affiliate, licensee, or nominees to whom [the master's owner has] supplied a copy or duplicate of a master. . . . " The defendants rely upon the use of the term licensee, arguing that it should apply to all licensing arrangements the owner of the masters engages in.

These arguments fail for three reasons. First, as the record reflects, many licensing contracts include fixed fee payments to the owner of the masters. Attempting to compute an artist's royalty payment in such an instance with the formula set forth in paragraph four does not make sense. One of the three variables used in the formula is based upon the "retail list price" of the record sold, another is based upon the volume of records sold. Neither of these variables would be helpful in computing a royalty when the payment involved is a fixed fee for use of a master, unless the licensee is using the master recording to copy for the retail music record industry and the licensee gives the owner of the masters, the licensor, data on the volume of records sold. Reviewing this record, we believe such a combination would be unlikely except when the licensee has some business relationship with the owner of the masters. This takes us to our second point.

The contract and the term "licensee" can be reasonably interpreted, without creating any internal inconsistencies or illogical conclusions, when we view the clause in question in its entirety. The term "licensee" is found in the paragraph where the formula for royalties from retail

sales is set forth. It is the third word in a series of four; we read "licensee" as being of a similar kind to the other words in the series: "subsidiary," "affiliate," and "nominee," *e.g., Board of Educ. v. Barni*, 66 A.D.2d 340, 345, 412 N.Y.S.2d 908 (N.Y.App.Div.1979), *rev'd on other grounds*, 49 N.Y.2d 311, 425 N.Y.S.2d 554, 401 N.E.2d 912 (1980); *Fishman v. Islip*, 20 Misc.2d 180, 181, 189 N.Y.S.2d 979 (N.Y.Sup.Ct. 1959); the term "licensee" is used in paragraph four to describe an entity having some business relationship connecting it with the owner of the masters, not an independent entity acting for its own profit.

G.M.L. and Gusto provide just such an example of connected entities. Owned and operated by the same individual, G.M.L. owns the master recordings, while Gusto is in the business of manufacturing and marketing copies of those recordings. By reading paragraph four in its entirety, we see that it was designed to include the royalty rate for this type of relationship and that the parties did not set forth a royalty rate for the foreign licensing income at issue.

The final problem with the defendants' argument is the fact that the artists received royalties at a rate of fifty percent on foreign licensing income in the past. The prior construction of a contract by the parties before the contract became the subject of this controversy is a prominent factor in determining the meaning of the contract. *See, e.g., Croce v. Kurnit*, 737 F.2d 229, 235 (2d Cir.1984). That neither Gusto nor G.M.L. were parties to the contract at the time the fifty percent royalty rate payments were made is of little assistance to their argument. As Gusto and G.M.L. concede, their purchase of the master recordings created an obligation to pay the royalties to

the artists on those masters. Looking to the construction of the ambiguous contracts by prior owners of the masters helps in determining the obligation. Together these three factors, the results from applying the royalty formula set forth to typical licensing payments; the entire structure of paragraph four; and the past construction of the contract, convince us that the district court properly accepted fifty percent as the royalty rate for the foreign license income at issue in the Thomas and Shirelles contracts.

Gusto and G.M.L. next argue that the district court erred in awarding Gene Pitney any license income. They assert as they did in the contracts with B.J. Thomas and the Shirelles, that any payment of licensing income is in conflict with the clear language of Gene Pitney's contract. The paragraph in question is number four in Gene Pitney's contract and is similar to paragraph four in the contracts of Thomas and the Shirelles; it states:

> 4. The Company agrees (a) during the first year of the agreement to pay the Artist a royalty of three (3%) percent, and during the second year of this agreement to pay the Artist a royalty of four (4%) percent of the suggested retail list price of ninety (90%) percent of all records embodying on both sides thereof the composition performed by the Artist and recorded hereunder manufactured and actually sold by the company or any subsidiary, affiliate or licensee to whom the Company has supplied a copy or duplicate of a master, matrix or embodiment of such composition or composition and (b) to pay the Artist one-half (1/2) the preceding amounts, respectively, for all records embodying such composition or compositions on only one side

> thereof manufactured and actually sold during each of such years, within the territorial limitations of the United States of America.

Gusto and G.M.L. again argue the use of "licensee" should be interpreted to include all licensing arrangements and again we reject that argument. For the same reasons the Thomas and Shirelles contracts do not address the foreign license income at issue in this case, we believe the fourth paragraph in Gene Pitney's contract does not address the payment of licensing income, except when the licensor has a business relationship connecting it with the owner of the masters. Accordingly, we believe the district court correctly applied the fifty percent rate to the licensing income at issue in Gene Pitney's contract.

Gusto and G.M.L. also argue the district court erred in finding them liable for royalties incurred by the prior owners of the masters. Gusto and G.M.L. mistakenly rely upon New York law in asserting that they should be liable only for royalty obligations arising after the date they purchased the masters. The determination of whether Gusto and G.M.L. are liable for royalties owed by the prior owner of the masters, Koala Records, is not determined by looking to the contracts between the plaintiffs and the original owners. Rather, we must look to the agreements between the defendants and Koala. The issue is: what did Koala sell to Gusto and G.M.L.? Did their sale of the master recordings include the transfer of royalty obligations incurred but not yet paid? to resolve this issue we are directed by the "most significant relationship" test, *see* Restatement (Second) of Conflict of Laws § 188 (1971), to the laws of Tennessee (Both G.M.L. and Koala are Tennessee based companies); however, neither

party presented precedent from Tennessee on this issue, nor could we discover any in our research. We believe Tennessee would probably follow the general rule that a corporation purchasing the assets of another does not assume liabilities unless one of three exceptions is met: an express or implied assumption as to liability, consolidation, merger, or other similar connection between the two companies, or fraud in the transfer between the companies.

The objective facts set forth in the record support the conclusion that there was an assumption in this case that G.M.L. and Gusto would accept Koala's liability. Among other things, the defendants claimed the rights to royalties earned before the date of sale, March 6, 1984, and the right to charge expenses of prior owners against the plaintiffs' royalties. The implication of such broad rights is that Koala's sale included much more than the mere sale of the master recordings. Indeed, viewed in the light most favorable to the plaintiff, the defendants' own expert explicitly testified that Koala's sale and Gusto's purchase included Gusto's obligation to assume the payment of accrued but unpaid royalties. We do not believe the district court committed a clear error by finding Gusto and G.M.L. liable for royalties owed by the prior owner of the masters.

Lastly, Gusto and G.M.L. argue that the district court incorrectly accepted the plaintiffs' expert's thirty-three percent incremental increase in the damage estimate. A trial court's determination of damages is to be set aside only upon the determination that it is clearly erroneous. *Smith v. Manausa*, 535 F.2d 353, 354 (6th Cir.1976). Gusto

and G.M.L. characterize the increase in damages as "arbitrary," "unfair," "guess work," and "the purest form of speculation." They ask this court to strike this increase in the damage award.

Not surprising, Gusto and G.M.L. all but ignore the factual findings of the district court, which set forth the reasons for the necessity of an incremental increase in the damages:

> In the first place, the record-keeping practices of Gusto Records are (to use the kindest possible expression) unorthodox. But its own admission, Gusto keeps no general or subsidiary ledgers, no sales records for individual items, no perpetual inventory, and indeed no sort of record which could document the relation of any income to a particular master or artist.
>
> The only thing the defendants had to offer were certain items which they denominated "royalty pay cards." As the name implies, these documents are small pieces of paper purporting to show the sales of products and the royalties due the artists thereunder. This form of documentation appears to be peculiar to Gusto Records; at least, the testimony at trial indicated that no one had ever seen the like. If such is the case, then all concerned can be thankful, for a more woefully inadequate method of recording royalty obligations is hard to imagine. Calculation of the artists' royalties is supposedly the cards' *raison d'etre*. Yet the format of the cards is such that there is no place on them to perform the computation.
>
> But this is not the sole (or even the chief) difficulty. One of the biggest problems with this

whole case is that no one seems to know how much Gusto product is out there in the marketplace. The defendants have effectively admitted that there exists no reliable record to the "universe" (as it is called) of Gusto products. At Gusto, even catalogs were apparently kept only on a sporadic basis. There was uncontradicted testimony that there is in the marketplace a large amount of Gusto product for which no corresponding "pay cards" have been prepared. Moreover, because of Gusto's grossly inadequate inventory records, the data on the "pay cards" cannot be supported by the kind of documentation upon which a reputable accountant would normally insist. In fact, a form of "record-keeping" which is compiled independently of all other documents can never be checked for accuracy at all. At very least, it creates a potential conflict of interest in the company; in the wrong hands, it can easily become an instrument of fraud and deceit. In short, this Court finds that the so-called "royalty payment cards" are a wholly inadequate index of the amount due to these artists.

An equally serious question concerns certain records which do exist, but are being withheld from this Court by the actions of the defendants. The bulk of Gusto & G.M.L.'s actual financial records are apparently in the possession of the accounting firm of Noel & Hundman in St. Louis, Missouri. Not surprisingly, the plaintiffs sought to depose the members of this firm, and they caused a subpoena duces tecum to be issued directing the firm to produce the records at the deposition. But on June 30, 1988, Noel & Hundman, at the insistence of the defendants, moved in the United States District Court

for the Eastern District of Missouri to quash the subpoena. On July 19, 1988, The Honorable William L. Hungate, District Judge, issued an order finding that the information sought was privileged under Missouri's accountant-client statute. Mo.Rev.Stat. § 326.151 (1986), and granting the motion to quash the subpoena. As a result, none of the members of the firm were deposed, and none testified at the trial. The financial records in their possession remain a mystery to all others, including this Court.

These actions by the defendants effectively put an end to any hope of obtaining a complete and accurate determination of just what it is that the defendants owe the plaintiffs.

. . . .

In a case like this one, where damages are uncertain and where expert testimony on highly specialized subjects must be offered, a defendant with something to hide will not do anything which could lighten the plaintiff's burden of proof, or give himself a burden of his own. But by allowing negative inferences to pile up, the defendants in the present case have done just that. We often hear of people butting their heads against a brick wall, but until now this Court had never heard of anyone building a brick wall expressly for that purpose.

In an action for royalties, it is a well established rule in New York that a "plaintiff need only demonstrate a 'stable foundation for a reasonable estimate of royalties. . . .' " *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir.1977) (quoting *Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379, 383, 357

N.Y.S.2d 857, 314 N.E.2d 419 (1974)). "The party who has caused the loss cannot insist on theoretical perfection." *Contemporary Mission, Inc.*, 557 F.2d at 928 (quoting *Entis v. Atlantic Wire & Cable Corp.*, 335 F.2d 759, 763 (2d Cir.1964)).

The evidence in the record shows the plaintiffs' expert had a "stable foundation" upon which to make estimations. Because of the unseemly record keeping of Gusto, the precise calculation of damages owed to the plaintiffs are impossible to determine. Gusto's records, or more appropriately Gusto's lack of records, prevents an exact determination of the universe of products and licenses. In order to make up for this deficiency, the plaintiffs' expert considered many factors, including sales of comparable products for which data is available, customs of the industry, sales and leasing figures from possessors of the masters owned by G.M.L., and the limited records of Gusto and G.M.L. We cannot say that the district court's reliance upon such testimony for the computation of damages, especially in light of the actions of Gusto and G.M.L., amounts to clear error.

For the foregoing reasons, we affirm the judgment of the district court.

KENNEDY, Circuit Judge, concurring in part and dissenting in part.

I concur in all of the Court's opinion except the holding that appellants are liable for royalties earned prior to the sale to Gusto Records, Inc. and G.M.L. Inc. and which were paid to Koala for the Thomas and Pitney masters. With respect to the Shirelles, I would affirm in

full since it appears that Gusto had licensed them to third parties years before its purchases from Koala.

I agree that there can be an express assumption of this liability. I also agree that if, as here, the contract is silent and there is no integration clause, then such assumption can be found to be an implied term of the sale by resorting to extrinsic evidence. The majority points to two pieces of such extrinsic evidence: defendants' claim of entitlement to royalties earned prior to the date of the purchase of the masters from Koala and their right to charge expenses of prior owners, as well as advances to the plaintiffs, against the plaintiffs' royalties. However the District Court made no factual finding that there was such an implied term. Although the District court accepted the testimony of the expert witness, I do not believe that testimony was sufficient to support a finding that there is such a custom in the industry.

Accordingly, I would remand the case to the District Court for a finding on that issue.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

B.J. THOMAS, GENE F. PITNEY, SHIRLEY OWENS ALSTON, DORIS COLEY JACKSON, BEVERLY LEE and VERNON MCFADDEN, JR.	]	No. 3-87-0975 Judge Higgins
Plaintiffs,	]	
vs.	]	
GUSTO RECORDS, INC. and G.M.L., INC.	]	

ORDER

In accordance with the memorandum contemporaneously entered, this Court finds in favor of the plaintiffs and against the defendants. Accordingly, the plaintiffs shall have and recover of the defendants Gusto Records, Inc. and G.M.L., Inc., jointly and severally, the following amounts: to plaintiff B.J. Thomas, the sum of $177,299.17; to plaintiff Gene F. Pitney, the sum of $187,762.44; to plaintiffs Shirley Owens Alston, Doris Coley Jackson, Beverly Lee, and Vernon McFadden, Jr., the sum of $119,537.07 each, being an equal division of the amount owed to the group known collectively as the Shirelles.

The Clerk is directed to enter judgment accordingly.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
5-1-90/

This document was entered on the docket in compliance with Rule 58 and/or Rule 79 (a), FRCP, on 5/2/90, By: K. Samples

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

B.J. THOMAS, et al.	]	No. 3-87-0975
	]	Judge Higgins
v.	]	
	]	
GUSTO RECORDS, INC., et al.	]	

MEMORANDUM

This is an action for an accounting of royalties, allegedly due to the plaintiffs, arising from the manufacture, sale and use of certain recordings originally created by the plaintiffs.[1]

THE PARTIES

Plaintiffs B.J. Thomas, Gene F. Pitney, Shirley Owens Alston, Doris Coley Jackson and Beverly Lee are all present or former recording artists and performers. Plaintiff Vernon McFadden is the widower, heir, and personal representative of the late Addie Harris McFadden, who was also a performer and recording artist.

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[1] According to the plaintiffs' theory in the pretrial order entered July 7, 1989 (Docket Entry No. 158), this action "seeks an accounting and damages by virtue of the nonpayment of royalties, *or*, in the alternative, rescission of the plaintiffs' original recording contracts and the return of the original masters recorded and manufactured thereunder to the plaintiffs." (emphasis supplied). For the reasons stated, the Court grants the relief sought of money damages and denies the alternative relief of rescission.

Defendant Gusto Records, Inc. is a Tennessee corporation with its principal place of business in Nashville. At one time, it was in the business of manufacturing and marketing sound recordings. However, there was testimony at the trial that it is no longer in business except for purposes of pursuing financial obligations due to it.

Defendant G.M.L., Inc. is a Missouri corporation having its principal place of business in Nashville, Tennessee. It exists in order to own and lease master recordings.[2],[3]

All of the plaintiffs are citizens of states other than Tennessee or Missouri. Therefore this Court has subject matter jurisdiction by virtue of diversity of citizenship and the amount in controversy. The parties agree that this litigation is controlled by the substantive law of New York.

THE ARTISTS

Gene Pitney, a native of Connecticut, recorded for Musicor Records in the 1960's and 70's. From 1961 to 1968, 16 of his songs became Top 40 hits on the *Billboard* charts. Four of them reached the Top Ten. His greatest hit

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[2] A master recording (or, more often, simply "master") is the principal embodiment of the artist's original sound recording, from which all subsequent impressions are taken. It is most frequently a tape, though in recent years recondite computer techniques are also used to produce them.

[3] Mr. Gayron "Moe" Lytle is the president, sole shareholder, and sole director of both Gusto Records and G.M.L. The evidence shows that both corporations are run as though they were sole proprietorships.

was "Only Love Can Break a Heart," which peaked at No. 2 in 1962.[4] Mr. Pitney is still active as a recording artist, but his current recordings are not part of the subject matter of this litigation.

Plaintiff B.J. Thomas, a native Texan, recorded for Scepter records of New York in the 60's and 70's. From 1966 through 1977, he had 14 Top 40 hits, five of which reached the Top Ten. "Raindrops Keep Fallin' on My Head" (1969) and "Another Somebody Done Somebody Wrong Song" (1975) both went to No. 1.

The Shirelles were four young women from New Jersey – Shirley Owens (later Alston), Doris Coley (later Jackson), Beverly Lee and Addie Harris (later McFadden). While still in high school, they too began to record for Scepter Records. From 1960 through 1963, the group had 12 Top 40 hits, five of which reached the Top Ten. "Will You Still Love Me Tomorrow" (1961) and "Soldier Boy" (1962) were No. 1 songs.

These data from the *Billboard* charts confirm the uncontradicted evidence presented at trial. These artists, while perhaps not "superstars" on the order of Elvis Presley, the Beatles, or the Rolling Stones, were nevertheless definitely "stars" by most conventional standards. They are considered significant figures in the history of pop music, and there is considerable esteem and demand for their work among those interested in the music of their period.

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[4] All data about the chart history of these artists are taken from J. Whitburn, *Billboard Book of Top 40 Hits* (3d ed. 1987).

THE CONTRACTS

On July 22, 1960, Plaintiff Gene Pitney signed a contract to record for Musicor Record Corporation. The contract was for a term of one year, with Musicor having the option to offer one-year renewals for a period of five successive years. Mr. Pitney's royalties were to be computed by use of a formula derived from the number of records sold. During the first year, the artist would receive royalties of 3 percent of the suggested retail price on 90 percent of the two-sided records sold in the United States and 50 percent of those sold in foreign markets. The arrangement for the second year was to be the same, except that Mr. Pitney's royalty percentage on United States records was to increase to 4 percent. After the first two years, Mr. Pitney's royalty percentage would rise to 5 percent of the retail price on 90 percent of the records sold in the United States.

In March, 1966, the contract was extended to 1972, and assigned to Talmadge Productions, Inc. Provisions were added to increase the royalty rate on foreign sales to 4 percent, and to cover sales made through direct mail and record clubs. These latter were to be one-half of the royalty rate that would otherwise apply, and would be computed based on 85 percent of the sales through that medium. Ultimately, the royalties were increased to 7 percent of the price on 90 percent of domestic sales and 5 percent of the price on 90 percent of the foreign sales.

On April 22, 1968, plaintiff B.J. Thomas signed a recording contract with Scepter Records, Inc. The agreement was for one year, with Scepter having the option to effect one-year renewals for four successive years. Mr.

Thomas was to be paid royalties in the amount of 5 percent of the net sales price on 90 percent of all records sold in the United States and containing selections recorded under the contract. He was also to receive 50 percent of the maximum rate on all sales in foreign markets and through record clubs.[5]

On February 15, 1961, the young women collectively known as the Shirelles signed a contract with Scepter Music, Inc. The provisions as to duration were the same as those in Scepter's contract with B.J. Thomas. For the first year of the contract, the Shirelles were to receive 4 percent of the net retail price on 90 percent of the records sold in the United States, adjusted to 5 percent in the remaining years. The royalty rate on foreign sales was to be 50 percent of the maximum throughout the term of the contract. A new agreement between the Shirelles and Scepter was signed in 1965, with provisions for two optional extensions of one year each. The 1965 contract had a "public performance" clause similar to that in Mr. Thomas' contract, though the original 1961 contract had lacked any such provision.

THE ODYSSEY OF THE MASTERS

The parties agree that in the absence of any contractual provision to the contrary, royalty obligations run with the masters – that is, anyone who acquires the

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[5] Mr. Thomas' contract also contains a clause stating that Scepter could cause "public performances" of the music recorded by Thomas under the contract without payment to the artist. As will be discussed below, the effect of this clause is disputed.

masters assumes the duty to pay royalties to the artist from master-related sales according to the tenor of the original contract. This litigation came about because through much of the 70's and 80's, the plaintiffs' masters were shunted back and forth between various record companies without much regard for the artists' rights.

Scepter and Musicor ultimately disposed of the plaintiffs' masters by selling them to a company called Springboard Records (from which transaction they have become known in the trade as the "Springboard masters"). Through a number of means conveyances, the masters came into the hands of Koala Records, which in turn sold them to G.M.L. on March 6, 1984.

Meanwhile, the plaintiffs were receiving few or no royalty payments, and began to search for the masters so that they could protect their rights in their use. They met with no success until they hired Mr. David Rubin, who heads a company dedicated to protecting artists' rights. It was Mr. Rubin who eventually learned that the masters were in the hands of G.M.L. and that Gusto had made extensive use of them. According to the plaintiffs, Gusto and G.M.L. refused to respond to demands that they disgorge the royalties due to the plaintiffs. The upshot was that the plaintiffs instituted the present litigation by filing their complaint in this Court on December 28, 1987.

THE PROBLEM WITH RECORDS (i.e., THE KIND ON PAPER)

In this case there is no real issue as to the fact of liability. The defendants do not deny that they owe these artists something. The only question is how much. Simple

as that question seems, it has proven not simple at all to answer, thanks largely to the actions and omissions of the defendants.

In the first place, the record-keeping practices of Gusto Records are (to use the kindest possible expression) unorthodox. By its own admission, Gusto keeps no general or subsidiary ledgers, no sales records for individual items, no perpetual inventory, and indeed no sort of record which could document the relation of any income to a particular master or artist.

The only things the defendants had to offer were certain items which they denominated "royalty pay cards." As the name implies, these documents are small pieces of paper purporting to show the sales of products and the royalties due the artists thereunder. This form of documentation appears to be peculiar to Gusto Records; at least, the testimony at trial indicated that no one had ever seen the like. If such is the case, then all concerned can be thankful, for a more woefully inadequate method of recording royalty obligations is hard to imagine. Calculation of the artists' royalties is supposedly the cards' *raison d'etre*. Yet the format of the cards is such that there is no place on them to perform the computation.

But this is not the sole (or even the chief) difficulty. One of the biggest problems with this whole case is that no one seems to know how much Gusto product is out there in the marketplace. The defendants have effectively admitted that there exists no reliable record of the "universe" (as it is called) of Gusto products. At Gusto, even catalogs were apparently kept only on a sporadic basis. There was uncontradicted testimony that there is in the

marketplace a large amount of Gusto product for which no corresponding "pay cards" have been prepared. Moreover, because of Gusto's grossly inadequate inventory records, the data on the "pay cards" cannot be supported by the kind of documentation upon which a reputable accountant would normally insist. In fact, a form of "record-keeping" which is compiled independently of all other documents can never be checked for accuracy at all. At very least, it creates a potential conflict of interest in the company; in the wrong hands, it can easily become an instrument of fraud and deceit. In short, this Court finds that the so-called "royalty payment cards" are a wholly inadequate index of the amount due to these artists.

An equally serious question concerns certain records which do exist, but are being withheld from this Court by the actions of the defendants. The bulk of Gusto & G.M.L.'s actual financial records are apparently in the possession of the accounting firm of Noel & Hundman in St. Louis, Missouri. Not surprisingly, the plaintiffs sought to depose the members of this firm, and they caused a subpoena duces tecum to be issued directing the firm to produce the records at the deposition. But on June 30, 1988, Noel & Hundman, at the insistence of the defendants, moved in the United States District Court for the Eastern District of Missouri to quash the subpoena. On July 19, 1988, The Honorable William L. Hungate, District Judge, issued an order finding that the information sought was privileged under Missouri's accountant-client statute, Mo. Rev. Stat. § 326.151 (1986), and granting the motion to quash the subpoena. As a result, none of the members of the firm were deposed, and none testified at

the trial. The financial records in their possession remain a mystery to all others, including this Court.

These actions by the defendants effectively put an end to any hope of obtaining a complete and accurate determination of just what it is that the defendants owe the plaintiffs. As a result, the Court is forced to traverse the misty realm of reasonable estimates.

Not every assertion of an evidentiary privilege is free from undesirable side-effects. Under New York law, "where a party withholds (or seeks to suppress) relevant evidence within its control, the court may conclude that such evidence would be harmful to the party's cause." *United States v. Philatelic Leasing, Ltd.*, 601 F. Supp. 1554, 1565-66 (S.D.N.Y. 1985). *See also, e.g., Comm'r of Social Services v. Philip DeG.*, 59 N. Y.2d 137, 450 N. E.2d 681, 683, 463 N.Y. S.2d 761, 763 (1983); *Ausch v. St. Paul Fire & Marine Ins. Co.*, 125 A. D.2d 43, 511 N. Y. S.2d 919, 923, *appeal denied* 70 N. Y.2d 610, 516 N. E.2d 1223, 522 N. Y. S.2d 110 (1987). Moreover, this is true even where the evidence is withheld pursuant to the invocation of a recognized statutory or common-law privilege. *E.g., Deutschmann v. Third Avenue R.R.*, 87 A.D. 503, 513-15, 84 N.Y.S. 887, 895 (1903) (physician-patient privilege).

The same problems inhere in the nonappearance of "Moe" Lytle.[6] Mr. Lytle did not testify at trial. True,

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[6] While it is true that the parties stipulated that Mr. Lytle was released from appearance at trial pursuant to the subpoena issued by plaintiffs, provided he return to Nashville if plaintiffs so requested, his nonappearance nevertheless left a gap in the telling of the whole story in this case. See stipulations filed July 10, 1989 (Docket Entry No. 163).

he was deposed, and portions of his deposition were read into the record, but the deposition did not address a number of questions raised by the other evidence that came out at trial, some of which was damaging to the defendants' position.[7]

Where a party in a civil case, having knowledge of material and relevant facts, refuses to testify or fails to call a witness known to have such knowledge, a court is entitled to infer that the testimony of that party or witness, if given truthfully, would have harmed the party's case. *E.g., Philip DeG., supra,* 450 N. E.2d at 683, 463 N. Y. S.2d at 763. *See also Gafford v. Trans-Texas Airways,* 299 F.2d 60, 63 (6th Cir. 1962); *In re Crabtree,* 39 Bankr. 718, 725 (Bankr. E.D. Tenn. 1984). Again, this is true even if a recognized privilege applies. *E.g., Lefkovitz v. Cunningham,* 431 U.S. 801, 808 n. 5, 97 S. Ct. 2132, 2137 n. 5, 5 L. Ed.2d 1 (1977); *R.S.O. Records, Inc. v. Peri,* 596 F. Supp. 849, 857 (S.D.N.Y. 1984).

In a case like this one, where damages are uncertain and where expert testimony on highly specialized subjects must be offered, a defendant with something to hide will not do anything which could lighten the plaintiff's burden of proof, or give himself a burden of his own. But

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[7] The importance of Mr. Lytle's position was underscored by the testimony of Gusto's own witnesses at trial. Amy Brakefield kept such financial records as existed at Gusto, but a fair summary of her testimony is that she was totally dependent on Mr. Lytle for data concerning sales records. Had he concealed any income from licensing or synchronization fees from her, she would have been none the wiser. The testimony of Gusto's former vice-president, Steve Kountzman, reinforced the overall impression of Mr. Lytle's total domination of both businesses.

by allowing negative inferences to pile up, the defendants in the present case have done just that. We often hear of people butting their heads against a brick wall, but until now this Court had never heard of anyone building a brick wall expressly for that purpose.

DAMAGES

The principal witness for the plaintiffs on the quantum of damages was Mr. Fred Wolinsky, an accountant who specializes in the music business.[8] Like this Court, Mr. Wolinsky opened by deploring the fact that the defendants' idiosyncratic methods of record-keeping made a detailed accounting impossible. Instead, he computed an estimate of the royalties due. He considered many factors, including (1) such records of Gusto and G.M.L. as did exist, and could be obtained; (2) sales and leasing figures acquired from mesne possessors of the masters, notably CBS Records and Warner Special Products; (3) sales of "comparable product" for which data are available; i.e., products of artists similar to the plaintiffs in style, type of market, and degree of popularity; and (4) his own knowledge of the custom and practice of the music industry as to matters about which contracts are silent.

Mr. Wolinsky's findings are embodied in the attached appendices 1A, 1B, 1C, 2A, 2B and 3, with summary of

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[8] Paul Bezilla, a lawyer specializing in the legal aspects of the music industry, testified chiefly about certain specialized markets within the industry, but he also corroborated Mr. Wolinsky's conclusions ("I find nothing in Mr. Wolinsky's statement with which I disagree").

findings.[9] As adjusted per Mr. Wolinsky's oral testimony at trial, the Court concludes that the defendants owe the plaintiffs the sum of $887,092.89 in royalties, licensing royalties, and synchronization fees.

To counter this testimony, the defense called its own expert witness, Mr. Thomas Bonetti. Mr. Bonetti is the head of Celebrity Licensing, Inc., the principal business of which is the licensing and brokering of master recordings. At trial, he gave a short prepared statement and extensive live testimony. He made several important criticisms of the assumptions and findings of Mr. Wolinsky, of which the most important was that the latter did not control for the presence of "bootleg"[10] products of the artists placed in the market by pirates.

Mr. Bonetti also questioned whether the "comparable" sales selected by Mr. Wolinsky bore any real relation to the market for the plaintiffs' work. He also pointed out that the sales of records, tapes and compact discs were extremely unpredictable, and that it was not unusual for even an established artist to have a hit followed by a flop.

All of this runs afoul of the most glaring fact about this litigation: to the extent that there is uncertainty about the sales of the plaintiffs' product, Gusto and G.M.L. are largely to blame for it. In a case where damages are certain as to existence but uncertain as to amount, "the party who has caused the loss may not insist on theoretical perfection." *Entis v. Atlantic Wire & Cable Corp.*, 335

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[9] This is plaintiffs' trial Exhibit 43.

[10] At trial there was general agreement that "bootlegging" is a major problem in the industry.

F.2d 759, 763 (2d Cir. 1964). It is the law in New York, and apparently everywhere else, that uncertainty as to the quantum of damages will not defeat recovery altogether. *E.g., Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir. 1977); *Randall Smith, Inc. v. 43rd Street Estates Corp.*, 17 N. Y.2d 99, 215 N. E.2d 494, 498, 268 N. Y. S.2d 306, 312 (1966); *Jaklitsch v. Finnerty*, 96 A.D.2d 690, 466 N. Y. S.2d 774, 776 (1983). *See also Novak & Co., Inc v. Facilities Development Corp.*, 116 A. D.2d 891, 498 N. Y. S.2d 492, 494 (1986) (recovery not defeated because quantum of damages "uncertain, beset by complexity, or difficult to ascertain").

The New York rule as to uncertain damages is that the plaintiff has an initial burden to produce evidence of one measure of damages. The burden then shifts to the defendant to show that another measure of damages, or a lesser amount, will adequately compensate the plaintiff for his loss. *E.g., Jenkins v. Entlinger*, 55 N. Y.2d 35, 432 N. E.2d 589, 591, 447 N. Y. S.2d 696, 698 (1982); *Jaklitsch, supra*. It has been held that the plaintiff's initial burden is satisfied by the production of evidence having "any tendency" to show damage in the amount proposed. *Contemporary Mission, supra*, 557 F.2d at 926; *Duane Jones Co. v. Burke*, 306 N.Y. 172, 117 N. E.2d 237, 247-48 (1954). Once such has been produced, the defendant bears the burden of rebuttal.

The above applies with even greater force where the defendant's conduct has *caused* the uncertainty. As the Supreme Court said in a leading case:

> [W]here the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation

> or guesswork. But the jury may make a just and reasonable estimate of the damage based on the relevant data and render its verdict accordingly. In such circumstances juries are allowed to act on probable and inferential as well as upon direct and positive proof. Any other rule would enable the wrongdoer to profit at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete . . . as to preclude recovery by rendering the damages uncertain. [Under such a rule] the more grievous the wrong done the less likelihood there would be of a recovery.

Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65, 66 S.Ct. 574, 579-80, 90 L.Ed. 652 (1946) (internal quotation and cite omitted). *Accord Whitney v. Citibank, N.A.*, 782 F.2d 1106, 1118 (2d. Cir. 1986); *Cullen v. Nassau County Civil Service Comm'n*, 53 N. Y.2d 492, 425 N. E.2d 858, 861, 442 N. Y. S.2d 470, 473 (1981).

The implications of this body of doctrine for the present case are clear and, for the defendants, ominous. The defendants have, by their own conduct, raised a cloud of negative inferences. Further, the Court finds that Mr. Wolinsky's assessment is reasonable on its face and has not been convincingly countered by Mr. Bonetti.

Indeed, on several issues the evidence of the latter seemed the more improbable. For example, Mr. Wolinsky testified that where the contract is silent, it is the practice in the music industry that the artist receives half of any fees accruing from the leasing of the matter to third parties. Mr. Bonetti categorically denied this. He said that in the absence of a contractual agreement, the artist gets nothing in such a transaction. The two experts had a

similar disagreement over the amount received by the artists from "synchronization" licensing. In fact, at one point, Mr. Bonetti went so far as to deny that an artist can have any rights at all in the master apart from those given by the contract:

> Q: So outside the contract, are there any generally accepted artist rights?
>
> A: Not in the United States. . . . Artists' rights per se are totally dependent on what the parties agreed.

Transcript Vol. III, pp 224 and 227.

This sweeping conclusion seems highly implausible. Recording artists are, at the least, no more likely to be ignorant of their rights or reticent about protecting them than other people. If the situation were as Mr. Bonetti says, one would expect that recording contracts without explicit provisions as to these matters would be rare, if not unknown. Yet it is clear from the evidence that such is not the case. Therefore, Mr. Wolinsky's version of these matters seems more convincing.

On two specific matters, this Court does conclude that Mr. Wolinsky's conclusions are defective or mistaken. The first is a minor error. On Appendix 2A (income from licensing to third parties), CBS Records, a mesne possessor of the masters, is listed as having leased on two occasions to Black Tulip. At trial, Mr. Bonetti testified without contradiction that Black Tulip was a notorious pirate company and that it was "inconceivable" that a reputable company like CBS Records would license masters to it. The plaintiffs' post-trial briefs concede the

mistake. All Black Tulip related income will be deleted from the total due.

The second adjustment is more substantial, and has to do with so-called "synchronization" income. A synchronization license (or "synch license", as it is called for short) is issued by the holder of a master recording and authorizes the use of the affected master to introduce the music into some audiovisual medium, most commonly a film, a television show, or a broadcast or filmed advertisement. In return for this license, the holder of the master receives a fee, called the "synch fee."

The immediate problem is that the contracts of B.J. Thomas and the Shirelles contain clauses in which the artist renounces any right to income from "public performances" of works covered by the contracts and authorized by the record company (and, *a fortiori*, by subsequent holders of the masters). As a practical matter, the Shirelles' contract is more important, since, as indicated in the plaintiffs' post-trial brief, the plaintiffs claim that the defendants owe the Shirelles income from synch licenses in the amount of $43,133.00, while no such income is claimed for Mr. Thomas.

The pertinent clause does not appear in the Shirelles' original 1961 contract with Scepter, but it was included in the 1965 renewal. It reads:

> 8. . . . We [i.e., Scepter] shall have the right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings by any method now or hereafter known, and *to cause the public performance thereof* without payment to you. . . . (emphasis added).

The defendants take this language to be a waiver of all synch fees. The plaintiffs, on the other hand, deny any waiver and insist that industry custom indicates that "public performance" means radio airplay.

There was no evidence at trial bearing directly on this question. Mr. Thomas and the individual members of the Shirelles all testified that they had not *understood* the provision to constitute a waiver of synch fees, but of course their subjective interpretation of the contract cannot, in and of itself, be decisive in determining the objective meaning of the phrase.

If, as the plaintiffs contend, "public performance" refers exclusively to radio airplay, it is remarkable that no court has so held. (At least, no case was cited to that effect, nor has this Court's research discovered any.)

The rule in New York, as everywhere, is that language in a contract must ordinarily be interpreted according to its "plain meaning." *E.g., Laba v. Carey,* 29 N. Y.2d 302, 277 N.E. 2d 641, 644, 327 N. Y. S.2d 613, 618 (1971). If the language is ambiguous, then the court may turn to "extrinsic circumstances" such as industry custom to explain the terms. *E.g., West, Weir & Bartel, Inc. v. Mary Carter Paint Co.,* 25 N. Y.2d 535, 255 N. E.2d 709, 711-12, 307 N. Y. S.2d 449, 452 (1969). But a Court may not read ambiguity into a plain instrument in order to open the door to an appeal to industry custom. The horse must be kept before the cart. The expression "public performance" does not seem at all ambiguous to this Court, nor is it easy to see how the inclusion of a musical work within an audio-visual presentation does not constitute a

"public performance" of the song as that phrase is normally understood. Therefore, the Court finds that these clauses constitute a waiver of all income to the artists from synchronization licenses, and all income derived from such licensing shall be deleted from the total due to the plaintiffs.

With the above modifications, the Court finds that Mr. Wolinsky's evidence is as accurate and reasonable a statement of the amounts due to the plaintiffs as could be compiled from the data available. Accordingly, the defendants are liable to each plaintiff in the amount specified in the Wolinsky exhibit, subject to the modifications discussed above.

An appropriate order will be entered.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
5-1-90

APPENDIX D

Revised and Enlarged
Fifth Edition

THIS
BUSINESS
OF MUSIC

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by Sidney Shemel and
M. William Krasilovsky

Billboard Publications, Inc.
New York

* * *

successful, no royalties will be payable to the artist until the recording costs for all five records have been recouped from the royalties earned on the successful record.

Record companies may liken the system of recoupment of recording costs from royalties to a joint enterprise or venture for the manufacture of a product, where the cost of production and the overhead must be repaid before the joint venturers divide any profits. With respect to records, the artist is paid union scale or more for his services, and he must wait until the costs of the enterprise are earned before he shares in additional income. The record companies may contend that while the system may be inexact, considering their large financial risk and the fact that the artist invests only his time, substantial justice results. An artist is rarely dependent in the main

on his record royalties; most performers derive their major income from personal appearances in concert halls and nightclubs and on television, and the record company will not share in such earnings, although recordings may have been essential in building the popularity required for personal appearances.

Recording costs vary with the type of recording. A two-sided singles record, containing one popular composition on each side, may be recorded for as little as $3,000 to $4,000 although the costs may aggregate $6,000 to $7,000 or more for an involved singles recording. Albums or LPs may range in cost from as low as $5,000 for a few musicians who use stock or informal "head" arrangements, to as much as $100,000 or more for large band recordings; well-known rock groups with a search for perfection have been known to run up costs in excess of $300,000 for an album. Recording costs for relatively new artists can range from $80,000 to $130,000 or more for one album. Original cast albums of Broadway shows may cost as much as $80,000 to $90,000 or more. Some LPs entail little or no additional recording costs since they are assembled from existing singles recordings.

Ownership and Use of Masters

A recording agreement is usually an employment contract, and the results and proceeds of the artist's services, unless otherwise provided, will belong to the record company, including the copyright in sound recordings recorded on or after February 15, 1972.[1] The artist retains

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[1] Prior to January 1, 1978, the effective date of the Copyright Act of 1976, copyright extended to sound recordings both recorded and distributed on or after February 15, 1972.

no interest in the physical tapes or masters or the copyright in the sound recordings and is restricted to a claim for contractual compensation and royalties. Exclusive rights under the copyright in sound recordings are limited to reproduction, the preparation of derivative works, and distribution; the right of public performance is not included.

A record company will jealously guard its ownership rights in masters and copyrights. However, in the case of certain successful artists, record companies, in order to secure their services, have agreed in relatively rare instances that the ownership of the masters and copyrights will revert to the artists after a period of years. Artists who desire to transfer to another record company find that the reversion of their recordings is a valuable right which enhances their worth to a new company. Where a reversion right is not granted, artists and their new company have been known to bid substantial sums to acquire ownership of the old masters and copyrights. To protect itself, a record company may agree to a reversion right provided that reversion will be delayed until all recording costs and advances to the artist have been recouped.

A record company can usually use a recording as it sees fit. It may issue the recording on any label it desires, and it may couple the recording with the recordings of other artists.

Lower Price Labels

Some record companies have several labels; one may be the top label and the others may denote secondary or

specialty labels or a cheaper line of records. For example, RCA uses the name RCA for its prime label and Camden for lower priced albums. In certain instances a record will be issue originally on the top label and after a period of time will be reissued on a secondary label. This practice may be found in the Camden line referred to above and on the Okeh label of CBS Records.

An artist may request that the recording contract provide for issuance solely on the top label of a company, at least in the United States. The company may grant the request for the United States, where it controls the pressing of the records, and may refuse the restriction for other countries where licensees are used and where flexibility in release is necessary. Alternatively, the company may insist on reserving the right to reissue the recording in the United States on a secondary label after a period of years, since thereby new sales may be stimulated at lower list prices.

Coupling

It is common for record companies to issue recordings which couple the performances of various artists. It has been found that the public is interested in such multiple performances, and increased sales result. Such sales will enhance royalties payable to the artists whose performances are included in the composite albums. Nevertheless, there is the danger that an artist may be cheapened and damaged by poor association in an album with other artists, and to protect themselves artists will at times attempted to obtain the right to approve the coupling of their recordings with other recordings. The company will

want the protection of a provision that approval will not be unreasonably withheld.

* * *

refuse to accept a unilateral right of termination by the artist, although it is willing to agree to an arbitration clause.

Bankruptcy

In a normal recording contract, there may be a potential term of five years, consisting of an initial period of one year and four one-year options. If there are sales of the artist's records beyond the five years, the relationship of the record company and the artist will continue as long as royalties are earned and payable. Relations between an artist and his record company may, however, be interrupted or revised by proceedings under bankruptcy laws involving either party.

In the 1980s there have been the bankruptcies of record labels such as Stax, General Recorded Tapes (Chess), All Platinum, and Springboard. In each instance the debtor's master recordings were sold and the funds collected by the bankruptcy creditor for distribution among the creditors. Delinquent artist royalties are ordinarily general debts with no priority in bankruptcy. Future artist royalties constitute a continuing obligation to be met at the prebankruptcy contractual rates. This obligation is commonly assumed by the purchaser of the master recordings. Under some record contracts, it is provided that the agreement will terminate and record masters are subject to recapture by the artist or producer

in case of bankruptcy. This would remove record masters from the assets of a bankrupt and make them unavailable to creditors.

At times recording artists have resorted to the bankruptcy courts to free them from onerous exclusive recording contracts. Willie Nile (professionally known as Noonan), an Arista Records recording artist, had accumulated a deficit royalty recoupment account which required the sale of a large number of records before it would become positive. He also had significant financial obligations for prebankruptcy legal expenses and his manager's $60,000 arbitration award. He had a limited cash flow and insubstantial assets. Arista Records, despite low sales, exercised its options to extend the agreement for 18 months, during which Nile would have to record two albums, in addition to two already made. Arista refused further advances to Nile that he had requested in order to help pay his financial obligations. In a Chapter 7 "straight bankruptcy" proceeding Nile became entitled to reject, and he did reject, his recording contract with Arista as an executory agreement; this is in contrast to the need to bankruptcy court approval to reject an executory contract in a proceeding for reorganization under Chapter 11 of the Bankruptcy Code.

Record companies may raise a good faith argument in opposition to an artist who files for bankruptcy for the sole purpose of breaking his recording contract or to place pressure on the record company to renegotiate his agreement. This contention is of dubious merit when a performing artist is in actual financial distress and is evidencing a need for the protection of the Bankruptcy Code. Arista Records did not raise the question of good

faith in the Nile bankruptcy proceeding, although in view of Nile's financial distress it is unlikely that the bankruptcy court would have found in favor of Arista.

In a case involving the artist George Jones, then under contract to CBS Records, a bankruptcy court held that the trustee in bankruptcy was vested with the artist's right to receive record royalties on prebankruptcy recordings. The court also decided that CBS could continue to recoup its advances in respect of such recordings from royalties on sales generated by the recordings. It is of interest that Jones' discharge in bankruptcy was ultimately denied for his failure to produce records of his financial status and business transactions for the year preceding the filing of his petition.